Report of the Workers Compensation Review Committee

May 1987

Manitoba

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THE WORKERS COMPENSATION ACT LEGISLATIVE REVIEW COMMITTEE

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Workers
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May, 1987

The Honourable H. Harapiak
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Dear Mr. Harapiak:

We are pleased to submit our Report on the workers' compensation in Manitoba. We trust that you will find it useful in evaluating the program.

All of us would like to thank you, and The Honourable Gerard Lecuyer, for allowing us to conduct this study.

Yours truly,

Brian King

Brian King, Chairperson,

Lissa Donner

Lissa Donner, Member,

Tom Farrell

Tom Farrell, Member.

BK/gb

SUMMARY OF THE WORKERS COMPENSATION REVIEW COMMITTEE REPORT

(This summary of the Report of the Workers Compensation Review Committee is intended to be read with the Committee's appended list of recommendations.)

The Report of the Workers Compensation Review Committee—Chairperson Brian King, and Members Lissa Donner and Tom Farrell—is the culmination of 20 months of consultations, public and private hearings, research, and preparation. In their Report, the Committee members affirm their belief that the workers' compensation system (albeit requiring extensive reform) is the best model for dealing with the difficult problem of work injury and disease.

The Committee, appointed in September 1985 by the Honourable Gerard Lecuyer, then Minister responsible for Workers Compensation, was instructed to make recommendations to the government for improving the program. Prior to holding public hearings, a Discussion Paper was prepared and widely distributed, outlining the terms-of-reference of the Committee and describing the main areas of concern about workers' compensation. Public hearings began in April 1986 and extended through to November of that year, drawing over 450 written and oral presentations, including those from injured workers, employers, trade unions, health care professionals and others. In addition, the Committee members travelled to the provinces of Ontario and Quebec for closer scrutiny of some of the reforms taking place in those jurisdictions. Out of these meetings and consultations, combined with internal Committee research, arose the 178 recommendations contained in the Report.

Several broad themes emerge when reviewing the Committee's recommendations. One of these themes has to do with the need for an open and accountable workers' compensation system. The Committee describes the difficulties that it experienced in attempting to gain information about workers' compensation from the Board—difficulties which required legislative intervention on the part of government to resolve. Echoing the Committee's concerns about a lack of openness on the part of the Board were the concerns expressed by workers, trade unions, employers, Worker Advisors and others.

The Committee, in a series of recommendations, calls for the Board to become more open and accountable. To begin with, a complete rewrite of *The Workers Compensation Act* is recommended, in a language, format and style that make it accessible to the average reader. In addition, the Committee calls on the Board to establish a Research and Policy Planning Unit which, in consultation with interested parties such as employers, trade unions, Workplace Safety and Health, etc., would be able to provide answers to many of the questions about the effectiveness of policies and practices at the Board, and assist in the creation of better public information about workers' compensation.

In addition to advocating the opening of workers' compensation to closer scrutiny (through provision of more accessible law and statistical data), the Committee provides specific recommendations for improvement in that aspect of the program. For example, there are the recommendations that workers be provided greater access to their files than at present, that Worker Advisors be given the right to review all files and records at the Board, that Executive Minutes of the Board be published, and that the policies and procedures presently considered internal to the Board's operation be made public. Supplementing these recommendations are others which would have the Board provide basic information on workers' compensation to workers at the time of injury, and would have the Board divulge actuarial reports on the state of its finances. In summary, the Committee was clear in its opinion that the workers' compensation system must be far more accessible to its constituents.

A second major theme in the Report is a strong emphasis on the need for the Board to return to an inquiry model of workers' compensation rather than the adversarial model which has evolved in recent years. Under an inquiry model, the Committee sees the Board taking the initiative in determining whether a worker has a valid claim or appeal. Rather than relying on the arguments presented by a worker or an advocate, the Board is counselled to do sufficient investigation to prove or disprove a claim. Although the view of the Committee reflects traditional thinking in the administration of workers' compensation, it also reflects the feeling that workers' compensation, to be effective in providing speedy and efficient service, must be self-policing to the greatest extent possible. There was concern expressed that elements of the adversarial system (including employer appeals by invitation of the Board, requests that workers prove their injury was work-related, overly-formalized appeal hearings, etc.) were interfering with the inquiry role of the Board.

Being more specific, there is a general recommendation throughout many of the chapters of the Report, for the Board to establish a cooperative working relationship with its clientele, rather than the perceived relationship of antagonism. Such a relationship, it is suggested, can be established through placing greater credibility on worker testimony than at present, planning **with** workers for their future in rehabilitation matters rather than **for** workers, and reorganizing the present multiplicity of handlers of a worker's claim into a Client Services Department which would deal with all aspects of a worker's needs.

A third major theme in the Report and recommendations to the Report is a call for the Board to do everything possible to allow for worker self-determination. Toward that end, the Committee has made numerous recommendations for entrenchment of workers' rights in both legislation and Board policy. It was strongly felt by the Committee that the Workers Compensation Board was too intimately involved in the private affairs of workers—their medical treatment, their personal family situation, their place of residence, their private income tax records, their private retirement plans, etc. The Committee expressed its opinion repeatedly, that workers are prepared to accept responsibility in their treatment, rehabilitation, and ultimate return to employment. Too much interference by the Board stifles initiative and creativity, and fosters hard feelings on the part of workers.

These three major themes will become more apparent in a reading of the list of recommendations which follows this Summary. Turning to recommendations and findings in specific areas of the Report, the Committee has recommended major changes in the structure of the Board, calling on the government to name a seven-member board of directors, composed of three full-time members and four part-time members (equally representing the interests of business and labour), with a neutral Chairperson. This type of arrangement, the Committee believes, will allow for a wider range of opinions to be represented on the Board, will allow for the recruiting of activists in industry and labour who might not be willing or able to serve full time, will expand the appeal capability of the Board, will bring more accountability back to the constituents and will allow a greater public-relations role for Board members.

The nature of appeals at the Board level has also seen recommended changes. Rather than continue with the present arrangement of having the Administrative Board serve as the Appeal Board, and rather than move to an independent appeal tribunal, the Committee has recommended the appointment of Appeals Chairpersons (one of whom, together with one labour member of the Board and one employer member of the Board, would comprise an appeal panel). Such an arrangement would allow for some independence of appeal, retaining the majority on the panel from the Board itself.

In the area of rehabilitation, the Committee is quite critical of the results of this process in Manitoba. Rather than merely make a set of recommendations for the Board to consider, the Committee feels that more emphatic steps are required, including the enactment in law of the entitlement of the worker to rehabilitation measures, similar to the entitlement of workers to benefit levels if they are totally disabled. Only through the clear outline of such entitlement in law does the Committee feel that equal emphasis will be placed on this important program as is presently placed on benefit programs. In some respects, the Committee is of the opinion that Chapter 7 of its Report, on Rehabilitation (placing emphasis as it does on providing alternate skills for workers to return to productive employment), is the single most important and necessary part of the needed reform to the compensation plan.

The Claims Department's handling of administrative and adjudicative issues comes under scrutiny in recommendations which would require, among other things, the establishment of time limits on the handling of appeals, the revision of the policy on not accepting unsolicited medical reports, and the amendment to the recalculation of average earnings after 26 weeks on compensation. Perhaps of greater importance, however, is the recommendation that claims adjudicators be given more control than they presently have in the area of adjudication. It is the Committee's opinion that initial adjudication is vital to the success of a compensation system, and that spreading the adjudication (as is done at present) over various departments such as Medical, Rehabilitation, Finance, and Medical Aid, results in inconsistency and a confusion about who is in control, which are detrimental to the workers. Consequently, the compensation system suffers in both efficiency and public relations.

Adjudicative issues have been handled in two ways in the Report. First, the Appendices to the Report contain lengthy background papers on a variety of adjudicative issues, including presumptive clauses, pre-existing conditions, occupational disease, and workers' compensation and the Charter of Rights. These papers provide a thorough discussion of issues of major concern to the Committee and, we believe, will prove invaluable to the Board, government and interested public who wish to understand the complexity of these issues. Second, the Committee has made specific recommendations in several areas where present Board policy requires clarification or where present Board policy is, in the opinion of the Committee, wrong. Thus, the Committee has made special recommendations in the area of pre-existing conditions, i.e. the rule of presumption, captive employees, and recurrences. Occupational diseases have also been addressed in the recommendation that a tripartite panel be established (similar to the Industrial Disease Standards Panel in Ontario) to prepare, monitor and update a schedule of occupational diseases which is to be appended to the law by way of regulation.

The Committee has found fault with some aspects of financing at the Workers Compensation Board. Although the recent Annual Report of the Board declares $84 million in unfunded liability, the Committee is of the opinion that an additional $5 million to $10 million is needed in the Equalization Reserve (Disaster Fund), and that a contingent liability of from $70 million to $90 million will likely have to be declared in the Pension Reserve in order to meet cost-of-living increases over time. In order to provide for more equitable coverage of all workers, and in order to provide fairness to all employers in the province, the Committee has made four recommendations in the area of the collective liability of the workers' compensation plan; namely, that the coverage of workers' compensation be extended to far more industries and workers than at present, that the self-insurers be brought under the collective liability plan, that "independent contractors" be provided compensation coverage and that a new rating schedule for assessing employers be developed with fewer rate codes and more well-defined categories of employment. The Committee rejects the concept of a merit-rating plan.

The benefit structure of the workers' compensation plan came under significant scrutiny by the Committee. Rejecting the wage loss plans which have been introduced in several provinces, the recommendation for Manitoba is for the adoption of a two-part compensation system—a lump sum which recognizes impairment to the maximum amount of $50,000, and a prospective wage loss **pension** which will recognize the disability caused by the impairment. The rating of the impairment portion of the two-part system is to be done using the American Medical Association *Guides* rather than the existing Board rating schedule. The pension portion of the award is to have an indexing feature and is payable to normal retirement age. In addition, lost retirement income is to be replaced through provisions for an annuity. Other features include special provisions for older workers and younger workers who have not reached their earning potential.

Recommendations in the area of benefits include changes to the replacement levels, as well. There is a majority recommendation that the income protection increase from $32,000 per year to $40,000 per year (1987), and that replacement change from 75 per cent of gross income to 90 per cent of net income. In addition, it is recommended that major benefit plans be continued for one year following work injury.

Surviving spouses are covered in the Report by the recommendation that a basic lump sum be made available, either as a lump sum or converted to a pension, in cases of fatality. The figure of $175,000 is recommended as the basic payment to a surviving spouse, with additional benefits being provided for dependent children. The Committee recommends removal of the remarriage provisions which discriminate on the grounds of marital status.

The Committee has only four minority positions in the 178 recommendations. Ms. Donner, the Labour Representative, dissents in recommending a wage ceiling of $50,000 (2.5 times the average wage) rather than the majority position of $40,000 (twice the average wage). As well, Ms. Donner argues for replacement of income at 100 per cent of net income rather than the majority recommendation of 90 per cent of net income. Mr. Farrell, the Industry Representative, dissents from the majority in recommending a different handling of pre-existing conditions, calling on the provincial government, rather than employers, to provide financing in this area. As well, Mr. Farrell recommends that employers be given the right to initiate a Medical Review Panel, which is counter to the position of the majority.

As earlier indicated, the Summary of the Report is intended to be read with the list of recommendations which follows. No summary can do complete justice to the contents of the Report and the reasoning behind the recommendations. Therefore, the Committee urges a reading of the full Report, and in particular, the material in the Appendices.

SUMMARY OF RECOMMENDATIONS

[*Editorial Note*: The Recommendations are drawn verbatim from the body of the Report.]

Chapter 2—Introduction

1. That *The Workers Compensation Act* be completely rewritten with special regard to accessibility to the constituents, workers and employers, in the simplest and most comprehensible language possible.
2. We recommend that at the time the *Act* is rewritten, special attention be paid to the removal or revision of outdated sections, such as the reference to specific diseases and conditions (hernia, dermatitis, neurosis and silicosis) and the "morality" clauses.
3. We recommend that the Workers Compensation Board develop a Research and Policy Planning Unit which will, in consultation with the Board of Commissioners, the management at the Workers Compensation Board, and the interested public, develop statistical information to assist all parties in evaluating and improving the program. This presupposes a full sharing of such information with employers, labour, Workplace Health and Safety, etc.

4. We recommend that the Workers Compensation Board, in cooperation and consultation with Workplace Health and Safety, develop an acceptable data base for use in the prevention of injuries and the early recognition of occupational diseases.

5. We recommend that Workers Compensation Board staff be given continuing training in the area of human relations, so that their contact with injured workers and employers be carried on as smoothly as possible.

6. We recommend that workers be allowed to choose their treating professional as well as their treatment.

7. That the worker has the right to choose his or her place of residence.

8. We recommend that workers be allowed to have vacations and out-of-province trips as a right, so long as it does not interfere with their treatment or rehabilitation.

9. We recommend that the Board allow workers to receive their permanent impairment pensions by way of lump sum, if they wish, rather than monthly payment, save in exceptional instances.

10. We recommend that the Board stop insisting on access to a worker's private Income Tax returns as a matter of course.

11. We recommend that the testimony of the worker in simple claims be given far more credibility by the Board than is apparent at the present time.

Chapter 6—Claims Issues

12. Section 15(1) of the current *Act*, regarding the obligation of employers to report to the Workers Compensation Board within three days of their notification, should remain. Its provisions should be enforced by the Workers Compensation Board. The Board should pursue electronic mail as a reporting mechanism and ensure the confidentiality of data so reported.

13. Injured workers who appeal decisions of the Workers Compensation Board have the right to speedy decision-making. Time limits, congruent with our recommendations regarding a new appeal structure, should be incorporated into the legislation. For example, 30 days for primary adjudication, 60 days for a written decision at the first level of appeal and 90 days for a written decision at the final level of appeal would be reasonable. Where the Board can show that extra time is required for a thorough inquiry, an extra 30-day extension should be allowed. These time limits should be maximums; they should not become the norm.

14. Once a claim has been denied or terminated by an adjudicator, it should return to that adjudicator, only for a speedy review. The adjudicator should not place a second opinion on the file before it proceeds to the next level of adjudication.

15. Once an appeal has been denied by the Review Committee, and the claimant wishes to proceed with a further appeal, it should proceed immediately to the Board of Commissioners for appeal.

16. In order to assure appellants that the second-level appeal process is a meaningful one, the Review Committee must become more independent of primary adjudication and the administration of the line departments.

17. The Manitoba Workers Compensation Board should negotiate a new medical reporting protocol and fee schedule with the Manitoba Medical Association.

18. Such a protocol should ensure that physicians report to the Workers Compensation Board as often as is necessary to ensure that the Board is able to make adjudicative decisions without interruptions in benefits to injured workers. The current policy of not accepting unsolicited medical reports should be reversed.

19. Such a protocol should ensure that in order to be accepted by the Manitoba Workers Compensation Board, medical reports be clear and comprehensive. Medical reports should contain objective findings where such are available, but medical reports should not be rejected because of the absence of objective medical findings.

20. The current Workers Compensation Board policy regarding the calculation of average earnings should be immediately revoked. Once a benefit level has been established by the Board, those benefits should not be reduced unless the original calculation was based on misinformation.

21. Average weekly earnings should be defined in *The Workers Compensation Act* as the greater of:

    1. one fifty-second of the actual earnings of the injured worker for the 12 months immediately preceding the commencement of the loss of earnings as a result of the injury, or

2. the rate of daily, weekly, monthly or other regular earnings that the worker was receiving at the commencement of the loss of earnings as a result of the injury, converted to a weekly amount.

In all cases, average weekly earnings should be subject to the maximum insurable earnings level set out in *The Workers Compensation Act*.

22. The Workers Compensation Board should not require that injured workers provide them with copies of income tax returns and other such confidential information.

23. The Finance Department should be a service department and not a line department. Staff of the Finance Department should not, therefore, have any adjudicative responsibilities. Decisions regarding the calculation of average earnings and the issuing of benefit cheques should be made by the adjudicator responsible for the claim.

24. The Medical Aid Department should be disbanded. The service functions—paying of physicians' bills, etc., — should be the responsibility of the Finance Department. Any adjudicative decisions regarding entitlement to benefits (such as prostheses, prescription drugs, aids to independent living, etc.), should be made by the adjudicator responsible for the claim. We do not mean to suggest that, for example, each time a prescription bill is submitted, a decision should be made, to pay or not to pay, by a claims adjudicator. The initial decision to pay is an adjudicative one. When subsequent bills for the same prescription are submitted, they should simply be paid by the Finance Department.

25. The role of Medical Officers should change. They should cease active involvement in claims adjudication. We recognize that this will also necessitate major changes in the Claims Department. However, we believe that these changes are needed.

    Workers compensation, in order to be successful, and accepted in the community, must be a self-policing system which relies primarily on the information submitted by workers, employers and community doctors. The Workers Compensation Board should, therefore, rely primarily on the information submitted by treating physicians and surgeons. In those exceptional circumstances where the claims adjudicator believes that a second opinion is necessary, a referral should be made, through the family doctor, to an appropriate medical specialist external to the Board.

26. The existing Claims and Rehabilitation Departments should merge into one Client Services Department. Our detailed recommendations for the mandate and operations of an integrated Client Services Department follow later in Chapter 13.

27. Injured workers should have full access to their files at any time, and not only to assist them in preparing an appeal.

28. All documents related to a claim, including material prepared for appeals before the Board of Commissioners, should be filed together to ensure easy and complete access.

29. The Manitoba Workers Compensation Board should make available to interested parties, all policies and guidelines used in the adjudication of claims.

30. All decisions of the Board of Commissioners should be reflected in the public minutes of the Board.

31. That a priority for the Manitoba Workers Compensation Board be the establishment of a management information system. Such a system should provide the Board of Commissioners, senior staff and other interested parties such as government, labour and management with the information necessary to evaluate the workers' compensation system in Manitoba.

32. That such a management information system, be compatible with those recommendations of the Federal Provincial Advisory Committee on Environmental and Occupational Health applicable to Workers Compensation.

Majority Recommendations [33 through 36: King and Donner]

33. The principle to be followed in the adjudication of cases involving pre-existing conditions is that the Workers Compensation Board is obligated to return the injured worker to his/her pre-injury condition or to provide fair compensation for the reduced health and/or financial status of the injured worker. The physical attributes of the injured worker, such as weight, height, gender and pregnancy, should not affect claims adjudication.

34. *The Workers Compensation Act* should be amended to state that claimants with static pre-existing conditions should not lose entitlement to compensation or receive reduced benefits, or receive benefits for a shortened period of time.

35. *The Workers Compensation Act* should be amended to state that in cases of deteriorating pre-existing conditions, compensation benefits should be paid for the period of temporary aggravation and for any permanent aggravation or enhancement resulting from the compensable injury.

36. The adjudication of claims for occupational diseases should follow the same principles noted above, i.e. that attributes of the claimant should not be considered as reasons to refuse, reduce or terminate benefits.

Minority Recommendations [37 though 39: Farrell]

37. That *The Workers Compensation Act* be amended to require the Board to establish a causal relationship that can be medically supported between the injury/illness and the worker's job.

38. That the wording of section 4(5) of *The Workers Compensation Act* be amended to permit the Board to use medically-accepted criteria in determining presumption.

39. That *The Workers Compensation Act* be amended to require the costs related to the operation of the Second Injury Fund to be assessed to the Manitoba Health Services Commission.

40. That adjudicative guidelines be published by the Workers Compensation Board, outlining the meaning of the rule of presumption.

41. That these guidelines include the following:
    a) That the onus is on the Workers Compensation Board to disprove a claim, not on the claimant to prove it.
    b) That no "incident" is required for a claim to be compensable.

42. The Workers Compensation Board's policy on coverage of captive employees should be revised to reflect the no-fault principle of workers' compensation.

43. Current policy, which requires that all cases in which an injured worker claims benefits for the recurrence of a previous compensable injury be referred to a Workers Compensation Board Medical Officer, should be changed to remove the necessity of such a referral.

44. Adjudicative practices in claims for recurrences should be guided by the same principles outlined elsewhere in this Report.

45. The Workers Compensation Board must perform its investigating activities under an inquiry rather than an adversarial model. The information provided by all parties should be given equal weight in order to allow for fair and impartial adjudication.

46. It is the responsibility of the Workers Compensation Board to ensure that an interpreter is made available in all cases in which the interviewee does not speak English as a first language, in order to avoid any misunderstanding.

47. All interviewees should be provided with copies of completed statements for their future reference.

48. In cases in which the interviewee has limited literacy skills, a fully-literate third party should be present to witness the statement in terms of its accuracy, and the statement should be read in its completed form to the interviewee for this same reason.

49. Where the worker is represented by a trade union, the worker should be advised that s/he may have a union representative present during any investigation, if desired.

50. A panel should be established to develop standards in the form of a Schedule of Occupational Diseases, to be implemented as a regulation under the *Act*. The panel should include representatives of the scientific and medical communities, and of industry and labour.

51. The standards developed by the panel should not limit the Board's authority to accept, on the balance of evidence, individual cases which are not covered by the Schedule.

52. The panel should also be responsible for expanding and revising the Schedule on an ongoing basis, with reference to recent scientific and medical information.

53. That all workers removed from work because of occupational lead poisoning receive compensation benefits, for the duration of this removal.

54. That, where the treating physician believes the worker's health will be jeopardized by a return to a leaded environment (and where the employer cannot provide suitable, alternate employment), the worker be eligible for the rehabilitation benefits outlined elsewhere in this Report. If the Workers Compensation Board disagrees with the opinion of the treating physician, it may refer the worker for a second opinion.

55. That the Workers Compensation Board work more closely with the Workplace Safety and Health Division, to ensure that workers with

lead poisoning receive well-coordinated services.

56. That the American Medical Association's *Guides to the Evaluation of Permanent Impairment* be used to rate levels of impairment resulting from noise-induced hearing loss.

57. That in addition to the rateable impairment for noise-induced hearing loss, specified in the American Medical Association's *Guides*, an additional award of up to 5 per cent be made in cases of tinnitus.

58. That those workers who are disabled (i.e. who cannot continue their employment) as a result of their impaired hearing, should receive the same benefits as other disabled workers, including rehabilitation services and a prospective wage loss pension.

59. That Workers Compensation Board staff not conduct workplace noise inspections unless:
    a) they have been thoroughly trained
    b) their inspection procedures comply with the provisions of The Workplace Safety and Health Act.

60. That the maximum allowable noise exposure (currently 90dBA) not be used as a minimum standard for establishing the compensability of a claim for noise-induced hearing loss. Compensation should be provided in all cases where the occupational history demonstrates significant noise exposure and where audiometric testing establishes a rateable impairment.

61. The Committee recommends that the current policy of the Workers Compensation Board, with regard to the adjudication of psychological conditions, as outlined in Board Order No. 114/84, should be revoked. We believe that it is the responsibility of the Workers Compensation Board to adjudicate claims for psychological conditions resulting from occupational injury or illness, on their merits, based on expert opinion regarding the severity of the impairment and of the relationship to the compensable condition.

    The Committee recognizes the difficulties involved in adjudication of psychological conditions. However, we do not believe that these difficulties can or should be addressed through imposition of a blanket policy, particularly one which allows for benefits and services to be terminated despite the existence of a recognized psychological condition—related by expert opinion to the compensable incident or condition, and severe enough to affect re-employment. We believe that this policy conflicts with the intentions of *The Workers Compensation Act*.

62. The Workers Compensation Board should cease from requiring injured workers to undergo psychological assessment, and from alleging non-cooperation in those cases where the worker does not comply.

    However, we feel that in cases where a psychological condition is suspected, the Board should recommend and encourage an assessment, in order to determine the appropriate follow-up and treatment.

63. Board Order 158/84 regarding Chronic Pain Syndrome should be rescinded.

64. The Workers Compensation Board should adjudicate chronic pain claims in the same manner as other claims for which compensation has been awarded.

    In those cases where the chronic pain results from the compensable injury which "arose out of and in the course of employment," then the Workers Compensation Board should be responsible for continuing compensation benefits.

65. The Workers Compensation Board should provide claimants with chronic pain syndrome, with the necessary assistance to reduce and/or manage their pain.

    These claimants will require a supportive and flexible compensation system, the objective of which should be to return them to meaningful employment.

66. That the Special Claims Unit no longer be responsible for adjudicating some of the more well-known and easily adjudicated conditions, such as claims for hearing loss, repetitive trauma disorders, and Reynaud's Phenomenon. Members of the Special Claims Unit could then spend the additional time which is gained, in training and working with less-experienced adjudicators. Ideally, adjudication staff should be able to competently handle all claims being filed, without having to use the services of a Special Claims Unit.

Chapter 7—Rehabilitation Issues

67. *The Workers Compensation Act* should be amended to provide an entitlement to services and benefits to any injured worker unable to return to his/her pre-accident employment due to a compensable condition, or to a suitable alternate actual job, within his/her physical

restrictions, with the pre-injury employer. Services should include:

1. Benefits

Benefits equal to those paid for temporary total disability should be paid while the injured worker is engaged in a mutually agreeable rehabilitation program.

2. Assessment

In order to provide injured workers and the Workers Compensation Board with the information necessary to set practical and realistic vocational goals, a professional assessment is necessary. All claimants should receive a professional job analysis and job modification study to explore vocational possibilities, both with the pre-accident employer and with other potential employers. A thorough assessment should also include interest and aptitude testing. Other assessment tools may be needed, depending upon individual circumstances. We believe that the identification of skills possessed by the injured worker and transferable amongst employers, should be an aid in the rehabilitation process, not a reason to terminate benefits.

3. Rehabilitation Services

The Workers Compensation Board, through its Vocational Rehabilitation Services Department, should provide or arrange for any services necessary to provide the injured worker with the specific skills necessary to reach the identified vocational/re-employment goal. Such services may include any training, either academic, on-the-job or a combination, which may be required. The services provided should reflect the individual requirements of the injured worker, as well as of the specific job toward which the vocational plan is geared.

4. Placement Services

a) We believe that prior to initiation of client-centered job search activities, the Vocational Rehabilitation Services Department must be able to demonstrate that the injured worker possesses the necessary skills to conduct an appropriate and effective job search, as well as the skills necessary to obtain and maintain the re-employment position which is the goal of the rehabilitation plan.

b) The Job Finding Club model has, in other jurisdictions, a demonstrated history of success. We encourage the Vocational Rehabilitation Services Department to expand this service in order to support and assist injured workers in job search efforts, and to make job search as non-aversive an activity as is possible. The Job Finding Club should be a supportive environment for injured workers attempting to re-enter the labour force.

c) We believe that the current method of job search used by the Vocational Rehabilitation Services Department, which requires a minimum number of employer contacts per week in all cases, should be eliminated in favour of programs appropriate to the individual circumstances of injured workers. Job searches should be targetted to the skills and abilities of the injured worker, as well as to the realities of the local employment market.

68. *The Workers Compensation Act* should include a definition of vocational rehabilitation which encompasses the above.

69. The Workers Compensation Board should move toward decentralization of services, through the location of offices in rural and northern Manitoba. These offices should have sufficient personnel and authority to adjudicate claims, pay benefits and provide rehabilitation services. The Workers Compensation Board must begin to provide rural and northern injured workers with the necessary skills—through academic retraining, training-on-the-job or any other appropriate means—to secure meaningful employment in or near their homes. The practice of requiring relocation not only undermines the rural and northern areas, but places increasing pressure on the labour markets of the larger centres.

70. The current policies and practices of the Workers Compensation Board, of terminating the benefits of those injured workers who refuse to relocate to Winnipeg, should cease. Relocation would be an acceptable alternative if it is desired by the injured worker and if suitable employment cannot be found in the worker's home area. The Workers Compensation Board must recognize the reality of two-earner families and must not, through required relocation, jeopardize the income of the injured worker's spouse or jeopardize the maintenance of the family.

71. The Committee recommends that authority for all expenditures deemed necessary to the vocational rehabilitation process, be placed in the hands of the Vocational Rehabilitation Services Department or of the vocational rehabilitation practitioners within the proposed Client Services Department. Such adjudicative authority

should not remain within the Medical Aid Department.

72. The termination of benefits and services to clients involved in vocational rehabilitation, on the basis of a medical re-examination or change of opinion, is, we believe, a questionable practice. Once a worker has been accepted for rehabilitation services, due to permanent disability, there should be no termination of benefits and services prior to completion of the mutually agreed upon rehabilitation plan, unless it is determined that the claim is one for which compensation should not have been payable, or unless there is a complete recovery from the disabling condition.

73. The Workers Compensation Board should review its current policy on preventative rehabilitation since, in our opinion, it discriminates on the basis of age.

74. The Vocational Rehabilitation Services Department must begin to identify sources of expertise necessary to provide complete and professional vocational assessments required for plan development and identification of a realistic reemployment goal. In those areas where the necessary expertise is not available in the community, the Workers Compensation Board should begin to develop such expertise on an "in-house" basis.

75. The Committee recommends that the Workers Compensation Board negotiate with the Manitoba Rehabilitation Hospital, to fund additional positions for occupational therapists to provide work assessments to injured workers, on site as well as in the hospital.

76. The Vocational Rehabilitation Services Department should begin gathering research material regarding existing technology for job analysis and job modification, in order to allow for early return to work with the accident employer wherever possible, as well as to assist in identifying alternative duties within post-accident physical restrictions.

77. The Committee recommends that the "deeming" of income be used only in those rare cases where the injured worker has refused a job, which s/he can be shown to be able to perform, at a verifiable level of income, within the physical restrictions as determined by the treating physician. If the Workers Compensation Board disagrees with the restrictions imposed, it may refer the worker for a second opinion.

78. The Committee believes that it is critical for the Workers Compensation Board to develop data base systems which accurately reflect vocational rehabilitation program costs and determine the extent of "successful" outcomes.

Chapter 8—Medical Issues

79. The responsibility for the monitoring of medical treatment should be returned to the treating physician who will be responsible for:

   1) diagnosis
   2) treatment and referral to specialists as required
   3) assignment of physical restrictions related to the compensable injury.

   In cases where the Board has a concern regarding any of the above, a second opinion may be sought from an appropriate practitioner in the community.

80. The responsibilities of the Medical Officer should include:

   1) examination of injured workers, in order to assess the degree of physical impairment for pension purposes
   2) consultation with lay staff, regarding medical conditions and/or the interpretation of medical reports received.

   Other than in the case of assessments of physical impairment for pensions, we see no role for the Medical Officer in direct physical examinations of injured workers.

81. The responsibility for determining the relationship of medical information to the compensable incident or situation, and for determining the work-relatedness of the injury or condition should lie with the claims adjudicators. The involvement of the Medical Officer should be limited to providing general information related to the condition under review. Comments by the Medical Officer regarding a particular case are not appropriate.

82. The Committee recommends a reduction in the staff of the Medical Department of the Workers Compensation Board.

   A redefinition of the duties appropriate for Medical Officers within the system, which should not include active intervention in medical treatment, will reduce the need for a large number of staff physicians and specialists.

   However, the Committee suggests that consideration be given, in light of increased activity in the area of occupational disease, to the hiring of an occupational medicine specialist.

83. Although the Committee acknowledges that trained nurses may have a role in a team approach to claims management and rehabilitation, we also feel that the Nurse Coordinator model, as currently designed, is not the best way to use this expertise.

84. The Committee recommends that section 19 of *The Workers Compensation Act* be rewritten, to apply only to those cases in which the injured worker is willfully delaying recovery in order to avoid a return to work.

We believe that decisions regarding choice of medical treatment must be left, except in those rare cases cited above, to the injured worker and his/her physician.

In those cases where the Board has serious concern regarding the efficacy and/or appropriateness of medical treatment, it may wish to arrange for another medical opinion to be provided.

85. The Committee recommends that the functions of the Medical Aid Department be taken over by the Client Services Department and the Finance Department.

Authority for expenditures should come from the relevant adjudicator, Claims Officer or Vocational Rehabilitation Counsellor, in cases where such payments are discretionary and require an adjudicative decision.

The Finance Department should be responsible for those payments which are automatic due to policy, for example, payments to physicians.

86. The current Medical Aid Manual needs revision, and new guidelines are required to assist staff in the adjudication of Medical Aid expenditures.

We feel that the current policies, in many cases, lack flexibility and are not sensitive enough to the circumstances of individual injured workers.

87. We recommend that the Workers Compensation Board provide injured workers with information regarding Medical Aid guidelines and procedures, as soon as possible following the date of injury. This could take the form, for example, of a brochure forwarded with the first benefit cheque.

It is the responsibility of the Board to ensure that injured workers are fully informed of their entitlements and of the procedures for reimbursement and/or authorization of expenditures.

88. Those costs normally associated with the active treatment of the compensable condition should be paid by the Workers Compensation Board, without the requirement for pre-authorization.

89. Adjudicative responsibility for Medical Aid should be removed from the Finance Department and placed with the combined Claims/Vocational Rehabilitation (Client Services) Department. Payments should continue to be the responsibility of the Finance Department.

90. The Committee believes that current policies relating to wage replacement, transportation, accommodation and other benefits to spouses of seriously injured workers, as provided under current policy, require significant enhancement. These benefits should be provided for an increased duration, under policy flexible enough to allow for sensitivity to the emotional and financial needs of individual families.

91. Translation and interpretation services should be provided upon the request of an injured worker, and should not require prior approval. Workers Compensation Board staff should be encouraged to use interpreters when they are unable to communicate effectively with an injured worker, due to a language barrier.

Chapter 9—Finance and Assessment Issues

92. That the Board explore the possibilities of reinsuring against a disaster, until such time as it is able to set aside an adequate Equalization Fund.

93. We recommend that the Board not allow funds set aside for special circumstances to be depleted in order to cover short-term shortages in revenue.

94. We recommend that the Rehabilitation Fund be closed out, with rehabilitation payments coming from general revenues.

95. That the Board move to an annual actuarial evaluation of reserves, with a complete sharing of the results with interested parties.

96. We recommend that future emerging surpluses be left in the Pension Fund, and that a full reporting of the contingent liabilities be undertaken. (Our figure of a $70- to $90-million shortfall, while based on professional opinion, is not actuarially confirmed.)

97. We recommend that the Manitoba Board begin using a much lower net discount rate in financing new pensions. While the precise rate to be used should be subject to discussions

with an actuary, we do not feel that it should be higher than three per cent.

98. We recommend that Section 66(1) of the *Act* be amended to reflect the practical problem of collecting sufficient assessments each year to meet expenditures. We agree with the concept of Section 66(1), but the wording may be too restrictive.

99. We recommend that workers' compensation coverage should be broadened to include as many employers and workers as possible. This should be done by amending the *Act* to provide for compulsory coverage, except in situations specifically excluded by Regulation.

100. Farm labourers should not be excluded from coverage by workers' compensation. Individual self-employed farmers should retain the right to take out voluntary coverage.

101. We recommend that no merit-rating plan be introduced in Manitoba workers' compensation.

102. We recommend that a new classification system be developed with fewer categories, rounded rates, and a larger spread between rates at the top end of the scale than exists at the bottom end.

103. We recommend that a minimum assessment rate be set for workers' compensation coverage, our suggestion being 50 cents per $100 of payroll.

104. We recommend that legislative and policy changes be adopted in Manitoba, similar to either Alberta or Saskatchewan, to protect individual workers designated as subcontractors.

Chapter 10—Proposals for Change—Benefits

105. We recommend that the present method of compensating workers on the basis of 75 per cent of gross income be replaced by a net income formula.

106. Further, we recommend that in calculating net income, only the three standard deductions—Canada Pension Plan, Unemployment Insurance, and income tax—be considered in the formula.

107. We recommend that the net income formula be calculated annually by the Compensation Board and published in the form of a table outlining the compensation rates for the various levels of income and various combinations of dependency status.

108. We further recommend that all measures be taken to simplify the reporting of income and dependency for use in calculating net income.

Majority Recommendations [King and Farrell]

109. Mr. King and Mr. Farrell recommend that replacement of income occur at the 90 per cent of net level.

110. That workers' compensation benefits for temporary total disability be calculated on the basis of 90 per cent of net income. For the purposes of *The Workers Compensation Act*, net income shall mean regular gross earnings minus the employee share of Unemployment Insurance and Canada Pension Plan Premiums.

Minority Recommendation [Donner]

111. That workers' compensation benefits for temporary total disability be calculated on the basis of 100 per cent of net income. [She agrees with the above definition of net income.]

Majority Recommendation [King and Farrell]

112. That the income ceiling for workers' compensation be set at the nearest $1,000 multiple of twice the average wage in the province of Manitoba.

Minority Recommendation [Donner]

113. That the income ceiling for workers' compensation be set at the nearest $1,000 multiple of two-and-one-half times the average wage in the province of Manitoba.

114. That the calculation and adjustment of the ceiling should occur on an annual basis.

115. That a dual-award system of compensating permanent partial disabilities be implemented, with one part recognizing permanent partial impairment, and the other part, a prospective wage loss pension, recognizing the effects of the impairment on the earning capacity of the worker.

> [Editorial Note: The body of the Report makes clear the Committee's belief that the wage-loss system as it currently exists in Saskatchewan and some other provinces, is not an acceptable alternative for Manitoba. Interested readers are directed to Chapter 10 of the Report.]

116. That the basis for rating the impairment be the American Medical Association *Guides to the*

116. That the basis for rating the impairment be the American Medical Association *Guides to the Evaluation of Permanent Impairment.*

117. That the award for impairment be based upon a $50,000-amount, with the award being paid (at the option on the worker), by way of a lump sum or pension.

118. That an escalator be applied to the lump-sum award so that it does not lose ground to inflation.

119. That a prospective wage-loss pension be set as soon after injury as possible, i.e. immediately after the following events have taken place: optimal recovery from injury, rehabilitation measures completed, and either a job found which suits the impairment or a determination made that the worker is unfit for further employment.

120. That such wage-loss pension and impairment award, if taken by way of pension, is to be escalated annually, on the anniversary date of injury, by the increase in average wages and salaries in Manitoba.

121. That the practice of deeming income be used only in the most restricted and rigid way (see recommendation 77).

122. That an additional 10 per cent of all compensation payments for permanent disabilities be set aside by the Board to provide for a retirement annuity when the worker reaches normal retirement age. Alternatively, the present formula being used for Special Additional Compensation cases—that of basing a retirement award on 2 per cent of the monthly amount being paid, times the number of years of the award—should be applied to our recommended disability plan, if it proves to be more advantageous to the worker.

123. That workers aged 60 and over who are injured receive a minimum of five years' wage-loss pension, if applicable.

124. That the prospective wage-loss pension, once set, should be reviewed at the worker's request if a significant reduction in his/her income takes place at a later date.

125. That the prospective wage-loss pension take into account the special circumstances of younger workers. For example:

    1) a high school student working in a fast food restaurant, who is injured and suffers a permanent disability, should be compensated on his/her true prospective earnings as an adult, not on the earnings at the time of injury

    2) a beginning trades apprentice, injured on the job, should be compensated on the basis of true prospective earnings as a journeyman.

126. That Canada Pension Disability payments not be deducted from the wage-loss pension.

127. That other costs of disability presently being funded by workers' compensation continue to be funded.

128. That an independence allowance of $1,800 per year be paid to those injured workers who:

    a) suffer significant permanent disability (i.e. 10 percent or greater), and

    b) are ineligible for Canada Pension Plan Disability benefits, either for adjudicative reasons (they have returned to work) or for administrative reasons (insufficient years of contribution).

129. We recommend that the present medical rating schedule for permanent impairments be amended to include ratings for disabilities which are now termed as "token" awards or "functional" awards. The medical rating schedule should not provide for an award if there is no disability or impairment resulting from a work injury.

130. We recommend that pensions continue to be awarded in the case of permanent disabilities until the new system is implemented, that the pensions fully recognize the level of the disability, and that Special Additional Compensation be used as a supplement to, and not a substitute for, such pensions.

131. We recommend that the Act be amended to allow for Special Additional Compensation and wage loss benefits in pre-1966 work injury claims.

132. The Committee believes that the system of benefits currently paid in Manitoba to surviving spouses and dependent children needs improvement. Models used in other jurisdictions are unacceptable for a variety of reasons including age discrimination. Therefore, we recommend that the following benefits for survivors be adopted in all fatal injuries occurring on or after a date to be specified in legislation:

    a) a sum of $175,000 to be paid to the surviving spouse, either in a lump sum or pension, as elected by the surviving spouse. The pension will be paid for a minimum period of 20 years to the surviving spouse or his/her estate.

b) $225 per month to be paid to the surviving spouse for each dependent child to age 18. Dependent children over 18, $325 per month while continuing in post-secondary education.

The Committee members also agree that The Workers Compensation Act should allow the Board sufficient authority to provide additional benefits beyond those prescribed in cases of unusual need.

133. We recommend that section 27(1) of the current *Workers Compensation Act* should be removed as soon as possible, because it is in contravention of the Canadian Charter of Rights and Freedoms, and because it may discourage remarriages, due to possible negative effects on family income.

134. We believe that section 27(5) of the current legislation, which allows the Board to divert payments for dependent children from parents, is not appropriate within *The Workers Compensation Act*. Such decisions should be made by the appropriate Child Welfare authorities.

135. That *The Employment Standards Act* be amended to guarantee that workers not be fired for the sole reason of having had a work injury.

136. That *The Workers Compensation Act* be amended to provide that employers have the obligation, wherever reasonably practicable, to return an injured worker to the job following optimal recovery.

137. That *The Workers Compensation Act* be amended to provide that trade unions have the obligation, wherever reasonably practicable, to modify seniority clauses in their collective agreements, in order to accommodate the return to work of disabled workers following optimal recovery from a compensable injury.

138. We recommend that employers be required to continue major benefit plans for at least one year following a compensable injury to a worker. In the case of cost-shared plans, injured workers would be required to continue their portion of the premium payments.

139. That *The Workers Compensation Act* be amended to provide compensation benefits to workers medically removed from their work, due to exposure to a workplace hazard. This amendment should specify that such benefits would be payable only in those cases where the employer cannot provide suitable, alternate employment.

140. That *The Workers Compensation Act* be amended to allow claimants to both collect workers' compensation benefits and to initiate lawsuits against third parties, i.e. against persons or companies who are neither employers nor workers covered by *The Workers Compensation Act of Manitoba*.

141. That such an amendment also protect the interests of the Workers Compensation Board by giving it the right to recover its costs of the claim from the proceeds of such actions.

142. That sections 25(1), subsections (b),(c), and (e), 25(3), 25(4) and 25(6), be amended to provide the stated benefits to surviving dependent children until 18 years of age, rather than until 16 years of age.

143. That the Board's diversionary power under section 21(5) be revoked, and that section 20 be amended to reflect the susceptibility to garnishment of workers' compensation benefits, already provided for in *The Garnishment Act of Manitoba*.

144. That the method of inflating a minor's average earnings for calculation purposes, contained in section 22 of the *Act* be revoked, as of April 1, 1988.

145. Those sections dealing with survivor benefits which discriminate on the basis of marital status should be amended to provide equal treatment.

Chapter 11—Proposals for Change—The Structure of The Workers Compensation Board

146. That the Board of Commissioners be tripartite in nature, with equal representation from business and labour, and an acceptable neutral Chairperson, and that this principle be enshrined in the law.

147. That the Chairperson and one member each from the business community and the labour community be appointed full time.

148. That there be four additional part-time members appointed to the Board—two each from the business and labour communities.

149. That two alternate members be appointed—one from business and one from labour—who are to serve only in the absence of a member from their constituency.

150. That the government closely consult with the respective interest groups, on all appointments to the Board of Commissioners.

151. That the Board of Commissioners define its function as policy development strategic management which would include the evaluation of policy implementation, the handling of appeals and of public relations, and which would leave the running of the day-to-day operation to the staff of the Board. Inherent in this recommendation is the opinion that Board members should cease their role as overseers of specific departments.

Chapter 12—Proposals for Change—Appeals

152. When an appeal is received it should be returned to the original adjudicator, only for a speedy review. The adjudicator should not place a second opinion on the file before it proceeds to the next level of appeal.

153. The Review Committee should become more independent of the primary adjudication process.

154. Workers Compensation Board Medical Officers should have no role in determining whether or not a Medical Review Panel should be convened. In all cases where the injured worker, supported in writing by his/her physician, believes that the Board has erred in denying or terminating benefits, or in determining the level of benefits to be paid (in the case of partial disability awards), and the claimant requests a Medical Review Panel, then one shall be convened by the Workers Compensation Board.

155. The Manitoba College of Physicians and Surgeons should replace the Manitoba Medical Association as the appropriate body to supply the Workers Compensation Board with a list of medical specialists from which the members of Medical Review Panels should be chosen.

156. An appropriate fee schedule should be negotiated between the Workers Compensation Board and the Manitoba Medical Association, to ensure that there are no financial barriers to injured workers being represented at Medical Review Panels, by the doctor of their choice. Once such a fee has been negotiated, the current practice (by some doctors) of extra-billing some employers should cease.

157. *The Workers Compensation Act* should be amended to allow for other professionals with relevant knowledge to be included on Medical Review Panels, at the discretion of the Panel and with the consent of the injured worker.

Minority Recommendation [Farrell]

158. In addition to the above, *The Workers Compensation Act* should be amended to permit employers to call for a Medical Review Panel to be convened, if, as is the case for workers, they have medical support for their position.

159. That three part-time Appeal Chairpersons, acceptable to both labour and management, be appointed by government, to assist in the appeal function of the Board of Commissioners.

160. That such individuals not be voting members of the Board of Commissioners, but be invited to attend policy and planning meetings of the Board.

161. All final appeals should be heard by a three-member panel composed of an Appeals Chairperson, one labour member of the Board of Commissioners (either full- or part-time) and one management member of the Board of Commissioners (either full- or part-time).

162. That a quorum for appeals at the Board of Commissioners' level be a tripartite panel of three members.

163. That Board hearings be non-adversarial in nature, the Board of Commissioners having previously reviewed the file under question. The panel should be free to question participants to the extent necessary to elicit the pertinent facts.

164. That all intermediary and final appeals be the administrative responsibility of a Director of Appeals. The Director of Appeals would have equivalent status to the Executive Director.

165. That the Board of Commissioners give careful consideration to recommendations received from the Ombudsman's Office, weighing the merits of its own decisions against the recommendations received.

166. That *The Workers Compensation Act* be amended to give Worker Advisors the power to review all relevant workers' compensation files and records, including policy documents which may have led to or influenced the decision.

167. That the Workers Compensation Board should view the Worker Advisors, not as potential adversaries, but as an aid to the inquiry process.

Chapter 13—Proposals for Change—Administrative Reorganization

168. That the Claims and Vocational Rehabilitation Services Departments be reorganized into a new, combined Client Services Department.

169. That the Client Services Department should operate on a team model and that each team should be composed of a claims adjudicator, a vocational rehabilitation counsellor, and necessary support staff.

170. That in order to provide well-coordinated services to injured workers, each team would be responsible for all payments and services to those injured workers in its caseload.

171. Specialized staff such as Re-employment Officers may be assigned to one or more teams.

172. That in order to operate successfully, our model presupposes the existence of:
    a) an improved computerized payment system,
    b) a more cooperative relationship between claims adjudicators and vocational rehabilitation staff,
    c) clear guidelines for injured workers as to benefits and services available,
    d) legislative change, as noted in Chapter 7, to provide an entitlement to vocational rehabilitation for those workers, disabled as the result of a compensable injury, who are unable to return to their pre-accident employment.

Chapter 14—Conclusion

173. That *The Workers Compensation Act* be amended to require a review of the workers' compensation system every four to five years.

174. That the *Act* require a balanced committee of employers and organized workers to be appointed for such a review, under the auspices of a neutral chairperson.

175. That sufficient resource staff be made available to such a committee in order to allow it to do a thorough job of analysis.

176. That such future committees be given powers of subpoena in order to review all matters pertaining to the compensation system.

177. That the government table in the Legislature within one year of receiving this Report, a progress report on the actual implementation, or proposed implementation, of those recommendations which are within the government's jurisdiction.

178. That the Workers Compensation Board publish a similar progress report in its Annual Report.

CHAPTER 1

PREFACE

I. ESTABLISHMENT OF THE COMMITTEE

On September 1, 1985, the Government of Manitoba appointed a three member Committee to do a detailed study of the workers' compensation system in the province.

The Chairperson, Mr. Brian King, has experience with the workers' compensation system as both an injured worker and administrator. In 1967, he was seriously injured in an industrial accident, received assistance from the compensation system in the form of benefits and rehabilitation, and in 1973 established the Office of Workers Advocate in the Province of Saskatchewan to assist injured workers with compensation claims. From 1979 to 1984 he served as Chairman of the Saskatchewan Workers Compensation Board. Mr. King, who has visited and studied the Workers Compensation Boards of eight Canadian jurisdictions, has been a guest speaker and lecturer at numerous conferences on workers' compensation across North America.

Ms. Lissa Donner, the Labour nominee to the Committee, is a graduate of the University of Manitoba School of Social Work. Since 1982 she has been Executive Director of the Manitoba Federation of Labour Occupational Health Centre and has assisted injured workers with claims for workers' compensation benefits and services. Ms. Donner has also been active on the Health and Safety, and Workers Compensation Committees of the Manitoba Federation of Labour.

Mr. Tom Farrell was appointed to the Committee to reflect the views of Manitoba industry. Since 1977 Mr. Farrell, in his position as Superintendent of Safety and Protection with Inco Limited, Manitoba Division, has been responsible for coordination of employee rehabilitation programs, for development and coordination of safety and health programs, and for administration of *The Workers Compensation Act* as it applies to Inco Limited.

II. TERMS OF REFERENCE

The Honourable Gerard Lecuyer, Minister responsible for *The Workers Compensation Act*, provided the Committee with the following Terms of Reference:

A. To review *The Workers Compensation Act* and identify those areas where legislative action is required to provide a more equitable and efficient system to workers, employers and community as a whole.

B. To review policies and directives of the Workers Compensation Board and discuss any of these matters with the Board of Commissioners and other staff members of the Board.

C. To invite participation of interest groups by public hearings, submission of briefs, and in camera discussions.

D. To review relevant legislation in other provincial jurisdictions.

E. To establish and forward to the Minister, comprehensive evaluations and recommendations on suggested improvements to *The Workers Compensation Act* within a period of eighteen months.

III. METHODOLOGY

In line with its Terms of Reference, the Committee's initial activities were focused on letting all interested parties know of the review and requesting input. Advertisements were placed in a number of Manitoba newspapers noting the establishment of the Committee, outlining its mandate, and soliciting representations. Public hearings were held in Winnipeg and other Manitoba points during the period April 1, 1986, to November 6, 1986.

The Committee was also approached by a number of individuals who, for a variety of reasons, requested the opportunity to meet privately. Therefore, some hearings were conducted in camera.

In addition, the Committee spoke with a wide variety of Workers Compensation Board employees representing both administrative and "line" staff.

Various topics and issues related to workers' compensation were researched by Committee staff with background papers produced to aid members in the review of the existing Manitoba system, and in the identification of specific recommendations for change—both in governing legislation and in Workers Compensation Board policies and procedures. Members of the Committee and staff reviewed in detail the administration and the policies and procedures of the Manitoba Workers Compensation Board. The staff researcher also created a history of the development of workers' compensation in Manitoba which is included in this Report (see Chapter 3).

Committee members had the opportunity to meet with representatives of Compensation Boards in Ontario and Quebec for discussion of changes and initiatives being undertaken in those provinces.

This Report and the recommendations of the Committee grew from a wide variety of sources within and outside the Province of Manitoba. The Committee members are grateful for the time and energy spent by all participants whether representing labour, industry, the medical community, injured workers or Compensation Board staff. We hope that this Report reflects these wide-ranging views in a positive and useful manner.

IV. DISCUSSION PAPER

To assist prospective presenters in identifying issues and in organizing comments and recommendations, the Committee drafted a Discussion Paper on workers' compensation, summarizing basic principles and identifying a variety of issues currently being addressed by Compensation Boards in Canada.

The Discussion Paper was mailed to any interested individual who contacted the Committee offices, by telephone or mail, requesting either an opportunity to present to the Committee, or further information as to the Committee's role and function. A copy of the Discussion Paper is included as Appendix "A."

V. MAIL-OUTS TO INJURED WORKERS AND EMPLOYERS

In addition to responding to contacts, the Committee also arranged for a letter to be mailed to all claimants who had appealed decisions of the Board at the second level of appeal or beyond within the previous three-year period. The material forwarded included the Terms of Reference of the Committee as well as background information. Approximately 1,200 mailings were undertaken. All Manitoba employers covered by *The Workers Compensation Act*, either by statute or by voluntary coverage, received similar information along with their 1986 assessment notices.

Response to the mail-out was very positive. These contacts, together with replies to the newspaper advertisements, resulted in a much larger number of presentations at public hearings than had been anticipated.

VI. PUBLIC HEARINGS

Initially, the Committee felt that the public hearings would be completed in one or two months. However, the number of requests to appear, extended hearings far beyond these expectations. They began in Thompson, Manitoba, on April 1, 1986, and the last public presentation took place in Winnipeg on November 6, 1986.

The Committee did not conduct public hearings without interruption. Schedules were established and revised in response to Committee needs, and requests to make presentions. Complete information regarding public hearings is contained in Appendix "B." However, summary information regarding the number of presentations heard by the Committee is as follows:

1. **Public Hearings**

i)	Injured Workers	=	257
ii)	Labour	=	32
iii)	Industry	=	42
iv)	Other	=	25
	Total		356

2. **Written Presentations**

i)	Injured Workers	=	58
ii)	Labour	=	4
iii)	Industry	=	9
iv)	Other	=	15
	Total		86

3. **In Camera Presentations** = 11

It is impossible to thank sufficiently the hundreds of injured workers, and scores of employers, trade unions, and others who gave us of their time, energy and experience, recommending improvements to the system based on that experience. To all who participated in this process, we dedicate this Report with the desire that they continue to work toward the betterment of workers' compensation.

VII. RESEARCH

As indicated earlier, the Committee identified a number of issues related to workers' compensation which required further research prior to the drafting of any recommendations for change.

The major research area involved a comprehensive history of workers' compensation in Manitoba, including the circumstances surrounding the creation of the original legislation, as well as the evolution of the system over time. Such a history has not previously been attempted. It is hoped that it will provide a more detailed context to the current Report. As well, it may also be of some value to future chroniclers of workers' compensation.

The Committee was fortunate in having a staff member with training in law. Therefore, the opportunity to research some of the more controversial issues being faced by Compensation Boards (not only in Manitoba but nationally) was undertaken, including preexisting medical conditions, the relationship of workers' compensation legislation to the Charter of Rights, etc. A selection of these background reports is included in the appendices to this document.

VIII. RELATIONSHIP WITH THE WORKERS COMPENSATION BOARD

One of the regrets shared by Committee members was the difficulty encountered in efforts to establish a cooperative and efficient working relationship with the Workers Compensation Board. The review process appeared to create unease at all levels within the organization, mitigating against open communication and contributing to an adversarial atmosphere very different from that which the Committee had intended or expected.

The Committee is aware that since the late 1970s the Manitoba Workers Compensation Board has been scrutinized by a variety of investigations and reviews, and that under these circumstances some degree of organizational "sensitivity" was to be expected. However, the Committee feels that it must comment on its relationship with the Workers Compensation Board since this issue may be seen as symptomatic of organizational problems which must be addressed in the process of making the workers' compensation system in Manitoba both more equitable and more efficient.

IX. OBJECTIVES OF THE REPORT

1) Legislation

As directed by the Terms of Reference provided by the Minister, the Committee undertook a critical analysis of the existing *Workers Compensation Act*. The process of the analysis is described in this Report as a context for the recommended legislative changes. In addition, reference will be made to the governing legislation in other jurisdictions in cases in which it illuminates the Manitoba situation or offers a possible initiative worthy of consideration.

2) Recommendations to the Government

The Committee was charged with a dual function: to make recommendations to the provincial government for changes to *The Workers Compensation Act*, and to the Workers Compensation Board for changes to its existing policies and procedures.

The recommendations to government fall into three major areas:

1) amendments to the written legislation
2) changes to the existing structure of the Workers Compensation Board
3) the relationship of the Workers Compensation Board to the provincial government.

It is hoped that these recommendations will be perceived as logical outgrowths of the analysis conducted by the Committee, reflecting a recognition of critical issues and legislative anomalies identified during this process and the public hearings.

Amendments to *The Workers Compensation Act* are intended to address issues currently of concern in workers' compensation nationally, and to attempt to update the legislation to be appropriate to present conditions and circumstances in Manitoba.

The Committee has also considered the current structure of the Workers Compensation Board to determine how structural modifications might benefit administration and service delivery. Our recommendations in this area are provided for the provincial government which has the authority to make such changes.

Finally, although the Workers Compensation Board is in essence independent of government with regard to adjudication of claims and setting of policy, the provincial government remains responsible to the Legislature for its operation in a manner similar to that of Crown corporations. The Committee has carefully examined the relationship between the Workers Compensation Board and the provincial government, in order to suggest to the Minister responsible for *The Workers Compensation Act* ways of facilitating government accountability while maintaining the independence of the Board.

3) Policies and Procedures

The Committee was also charged with reviewing, in addition to *The Workers Compensation Act*, the policies and procedures generated by the Workers Compensation Board.

The relationship of policy and procedure to legislation is a complex one and not easily described. Policies are basically interpretations, made by an organization's administration, of legislation. Their purpose is to provide the basic structure for service on a day-to-day basis. Procedures are management's interpretations of policies. They are the specific guidelines for service delivery.

In theory, these three structural levels should be congruent, which is to say that policies should grow directly and logically from legislation, and procedures from policies. However, in the real world this ideal is never realized.

The Committee has analyzed the policies and procedures of the Manitoba Workers Compensation Board as thoroughly as time has allowed. The difficulties faced in obtaining a complete set of written policies from the Workers Compensation Board have been considerable. Procedures can be elusive since they may not be in written form. Nevertheless, the Committee is confident that its research, in combination with information received at public hearings, has allowed for a critical analysis of the most important issues. That analysis, plus the recommendations for change to existing policies and procedures, follows.

4) Recommendations to the Workers Compensation Board

The Committee's recommendations to the Board of Commissioners of the Workers Compensation Board address policies and procedures from three perspectives:

1) misinterpretation/misapplication of existing legislation.
2) the need for new/revised policies and procedures to reflect recommended changes to *The Workers Compensation Act*.
3) the relationship between the Board and the provincial government.

The changes recommended are intended to facilitate congruence between law and policy, as well as provide consistent and equitable treatment of workers' compensation claimants. The Committee also recognizes that the most progressive of policies is insufficient to ensure quality of service when procedures result in delays and inefficiences. Therefore, recommendations have also been made with a view toward simplifying and streamlining procedures for maximum speed and efficiency.

The relationship between the Workers Compensation Board and the government has also been examined from the perspective of policy and procedure. The Committee believes that for the workers' compensation system to operate at its best, this relationship and the respective roles and responsibilities must be clear to both parties in order to avoid confusion about authority. Therefore, recommendations have been made regarding the Board of Commissioners' ongoing, day-to-day dealings with the Minister responsible for workers' compensation.

X. ACKNOWLEDGEMENTS

We wish to wholeheartedly thank all of those associated in any may with this review. In the first instance, to the injured workers, employers, trade unions and others who took the time and energy to come forward to public or private hearings, or who wrote to us or presented a written brief, our thanks. The ideas put forward, the case histories outlined, and the suggestions made for improvement were much appreciated. We hope that this Report at least begins the process of improving and making more equitable the compensation system.

We also wish to thank those we approached for advice and assistance regarding worker's compensation, including the Boards in Ontario, Quebec, Saskatchewan, and Manitoba. As well, we received time and assistance from the Executive Director of the Canadian Association of Workers Compensation Boards, Ken Harding.

The faith placed in this Committee and the patience of the government in extending the original deadline for completion of the Report are appreciated, with special mention of The Honourable Gerard Lecuyer and The Honourable Harry Harapiak.

Each member of the Committee also wishes to extend individual appreciation. Mr. King wishes to thank Ken and Aline Carrol for making his stay in Winnipeg more enjoyable than it might otherwise have been had they not provided friendship and assistance; as well, he thanks his wife Barbara for being supportive in his absences from Regina. Ms. Donner wishes to express her gratitude to Dick Martin, John Pullen and Wilf Hudson, to her colleagues at the Manitoba Federation of Labour's Occupational Health Centre, to Ruby and Rachel Donner and to the women's group. Their encouragement and critical support made a difficult job a lot easier. Mr. Farrell would like to thank his employer, INCO Limited, for their understanding and support as well as those individuals who took time out of busy schedules on short notice, to share their collective experience in the field of workers' compensation—in particular, Elaine Smith, Bill McGill, Dale Botting, Mike Cuma, W. Newman and Gordon McPherson, and all those representatives of the Employers' Task Force. Without their trust and support, the task would have been far more difficult, if not impossible; and finally, he thanks his wife Marlene who tolerated a part-time husband for the past year-and-a-half.

There are, of course, others. We cannot pretend to give credit in each instance that we should, and rather than risk missing anyone, we offer a blanket thanks to all of you, including our staff of Scott Byiers, Debra Hathaway, Evelyn Adams, Miriam Gal, Gail Bruce, Nancy Windjack and Helen Stein.

CHAPTER 2

INTRODUCTION

Preamble

Workers' compensation is one of the least understood programs in Canada. Some groups and individuals who came forward at public hearings felt that workers' compensation fits into the slot of social welfare for workers injured on the job—a method of easing the financial burden of work injuries on workers and their families—and that workers should be satisfied with whatever benefits they receive. Other participants in the hearing process took the diametrically opposite view that workers had the absolute right to receive compensation for all their losses brought about by a work injury, including payment for the pain, suffering and loss of amenities caused by a serious injury. Many others, perhaps the majority, had no strong viewpoint on this subject, but were very aware through personal experience, that whatever the program's intent or philosophy, it had been inadequate to meet their own needs and expectations following work injury.

We consider it essential that people understand how and why workers' compensation arose and evolved into the system that it is today. Therefore, we have included in this Report a chapter on the History of Workers Compensation in Manitoba. By knowing where we have come from, where we are today, and by placing our recommendations for reform in this context, we feel that people will be left with a well-rounded understanding of workers' compensation.

In addition to the history of compensation in Manitoba, we have done an overview of compensation systems across Canada. This overview includes a comparison and contrast of coverages available in the various compensation jurisdictions—their differences and similarities—and gives a good idea of where Manitoba fits into the entire picture. Again, a reading of this section of the Report will show that Manitoba provides generally average benefits when compared with other provinces.

Our major recommendations, quite understandably, involve changes to the law governing workers' compensation, *The Workers Compensation Act*. These recommendations are there for the government to review, analyze, and respond to, either by implementing the recommendations in whole or in part through legislative amendment, or by rejecting the proposed changes. In any event, the government is the body responsible for the decision making on matters requiring legislative amendment. We want this clearly understood in terms of the accountability and responsibility for the program.

Less major, but just as important to the success of this Report, are recommendations for changes in workers' compensation at the policy and procedures level. The Workers Compensation Board, as the governing body, is responsible for the interpretation of the law and the setting of policies and procedures for the implementation of the law. Therefore, it is responsible and accountable for the recommendations in this area.

Having briefly outlined the lines of accountability, we ask that the interested parties, those who came forward to public hearings or who have an ongoing interest in the program, let their views be known to the government and/or the Board on the matters contained in this Report. The process of reform of a system as complex and important as workers' compensation requires the continual input and involvement of those affected.

Cornerstones

What, then, is this system which requires such careful evaluation? Quite simply, it is a method, perhaps the only one, for handling the staggering problem posed by work injuries in our society. Prior to its establishment, workers injured on the job had to rely on personal savings; the charity of family, friends and/or society; or a lawsuit against their employers to survive the financial trauma of being out of work. Putting aside sufficient resources to self-insure against long-term injury was and is an impossibility for most workers. Relying on charity, be it from family, friends or society was degrading. And a lawsuit against employers was fraught with problems, not the least of which were the necessity and difficulty of proving negligence, the uncertainty of success, the lengthy delay in proceedings, and the cost of an action. Employers faced problems as well. An employer who did insure his/her workers against work injury was at a competitive disadvantage in relation to the employer who did not insure. Thus the good employer was penalized. As well, there was notoriety and the negative publicity surrounding a lawsuit, including the loss of morale among staff when fellow workers were left destitute following a work injury. Finally, there was the financial risk of a large court award to a worker injured on the job. The reform to this mutually unacceptable situation came by way of workers' compensation legislation.

There were five basic cornerstones to the original workers' compensation laws—cornerstones which have survived to a greater or lesser extent to the present. The five cornerstones are as follows:

1. *No Fault Coverage*—Workers gave up all rights to sue their employer for the effects of a work injury in return for automatic benefits if injured on the job, irrespective of fault on the part of the worker or the employer.

2. *Collective Liability*—In return for freedom against lawsuits by workers injured on the job, employers became collectively liable to pay for the costs of workers' compensation.

3. *Guaranteed Benefits*—Workers were guaranteed payment of benefits at a legislated level, irrespective of bankruptcy of individual employers or insurers

4. *Independent Administration*—The designers of workers' compensation provided for administration of the program by an independent board.

5. *Exclusive Jurisdiction*—The independent boards were granted quasi-judicial authority to make final determination on all matters pertaining to workers' compensation law, with no review by the courts or other external agency.

Throughout the course of our inquiry, in public hearings and in private meetings, we heard from interested parties on these issues. Although there were some who questioned the historic compromise upon which workers' compensation was founded, the number of people who for instance called for a return to the right of workers to sue was extremely limited. Different opinions from differing perspectives certainly criticized workers' compensation; but criticisms about the founding principles of the program focused more on the present status of the Board's direction—financial and adjudicative—than on the basic principles.

A good deal of concern has been raised across Canada in recent months among employers, workers, compensation administrators, and governments. The reason for the concern is a decision of the Supreme Court of Newfoundland (*Piercey* v. *General Bakeries Limited*) that *The Workers Compensation Act* of that province violates the Charter of Rights and Freedoms by prohibiting an injured worker from suing his or her employer for the result of a work injury. Although the decision is under appeal, if upheld it may mean the end of workers' compensation as we know it. Employers, left unprotected against a lawsuit by workers' compensation legislation, would become liable for the costs of a lawsuit. If unable to obtain liability insurance, or if liability insurance were too costly, employers would face the risk of being driven from business. Workers unable to afford the costs of a court action, or who were unable to prove negligence, would suffer. We are alarmed by this development, believing as we do that the vast majority of workers and employers would be ill-served by a change of this magnitude.

A careful reading of the recommendations in this Report will show that we affirm the founding principles of workers' compensation and believe that it is more remedial in solving the problem of compensating work injuries than any alternative. A careful reading of the Report will also show that we are critical, in what we trust is a constructive manner, of many areas of present day workers' compensation in Manitoba. Such criticism does not detract from our basic belief that properly operated, workers' compensation is part of the solution and not the problem.

The Act

Many who came forward in hearings before this Committee unfortunately see workers' compensation as problematic in a number of areas. The first point we would like to mention is a general lack of understanding of the program. *The Workers Compensation Act*, which forms the basis for the plan's existence and outlines rights, duties, and responsibilities of employers, workers, and the Board itself, is in need of wholesale revision. The *Act*, originally drafted many years ago, has seen numerous *ad hoc* amendments over the years. It was written at a time when legal language, rather than the more modern approach of easy-to-read text, was in vogue. If workers and employers are unable to comprehend the intricacies of the *Act*, it is no wonder that there is this misunderstanding. Therefore, our first recommendation for government is as follows:

1. **That *The Workers Compensation Act* be completely rewritten with special regard to accessibility to the constituents, workers and employers, in the simplest and most comprehensible language possible.**

While we could provide a good deal of specific advice as to the changes required in this rewriting, and indeed many of the recommendations in this Report do provide such specific advice, the actual function of redrafting a complex law involves an ongoing and dynamic process. We do not consider it our function to review every section of the *Act* with a view to commenting on deletion, addition or amendment. That is a function of the actual drafting process. Let us, however, point to several areas in the *Act* which, not covered elsewhere in this Report, require deletion.

To begin with, the *Act* contains specific reference to certain physical and mental conditions which, although arguably valid at the time inserted, have little validity in the context of today's adjudication and claims processing. For instance, the conditions of dermatitis (Section 90), silicosis (Section 88), hernia (Section 4), and neurosis (various references) are singled out and given special rules for handling.

There is no valid reason for the special attention directed towards these conditions, and reference to such conditions should be removed from the *Act*. Similarly, there are certain rules outlined for the members of the Board to follow which are questionable in providing direction to contemporary management. As examples of these type of rules we would cite the requirement that the Board meet at least once a week (Section 49), and that Board members not directly or indirectly have any interest in any industry covered by the *Act* (Section 47). We believe that the Board should meet as often as is necessary to conduct its business, and that the conflict of interest rules need to be updated to reflect current thinking on the subject.

There are several other examples of outdated provisions which remain in the *Act*, including morality sections [21(2), 21(4)] which direct the Board to review situations where workers are incarcerated to jail or a mental institution, and which direct the Board to intervene when common-law relationships have been entered into by certain claimants. Such sections need revision and/or removal. As a final example of the sort of rewrite required, we refer to the section (9) which does not allow a worker to be represented by council unless the Board gives its express permission.

2. **We recommend that at the time the Act is rewritten, special attention be paid to the removal or revision of outdated sections, such as the reference to specific diseases and conditions (hernia, dermatitis, neurosis and silicosis) and the "morality" clauses.**

Research

Having identified the lack of understanding of the law by both workers and employers, and having determined that a total rewrite of the *Act* is necessary to make it more relevant and understandable, we moved towards trying ourselves to understand how it worked and how efficiently the program worked. We discovered the inability of the compensation system to readily provide answers to some of our basic questions. There is not enough statistical data available about the program; what is available is difficult to use and requests for anything other than the norm required too much time on the part of the Board to produce. It is difficult to do a full analysis or review of the compensation system without the raw data being available which would support or reject the various options for change.

We do not particularly blame individuals at the Board or the organization itself for the inability to produce such data in a fast and efficient manner. The fact is that the Board does not have a research and planning unit which can be relied on to generate the necessary information for program analysis, policy analysis, option analysis, etc. We are not the only group to feel this lack of capability on the part of workers' compensation to provide such information. Time and again in public hearings we heard from groups which had a similar complaint. We question, as well, the ability of Board members and management to make well-reasoned decisions based upon full and objective analysis of the facts without the support of a research and policy planning unit.

3. **We recommend that the Workers Compensation Board develop a Research and Policy Planning Unit which will, in consultation with the Board of Commissioners, the management at the Board, and the interested public, develop statistical information to assist all parties in evaluating and improving the program. This presupposes a full sharing of such information with employers, labour, Workplace Health and Safety, etc.**

The Tone of Our Report

Some readers of this Report may find the tone to be critical of the Board's operation. Let us say several things about the tone of the Report at the outset. Firstly, we have examined hundreds of policies, procedures and documents made available to us by the Board over the last year-and-a-half. Many of these policies, if not the majority, have been developed and up-dated by the Board over the past several years in what has been a monumental attempt to modernize the operation to bring it up-to-date and in line with contemporary workers' compensation in Canada. It should be neither surprising nor particularly disturbing that our Committee, which has had more time for deliberation on targetted issues, should disagree with or find room for improvement in numerous of these policies. Therefore, although we are critical of many policies and procedures at the Board, we recognize that there are hundreds of other aspects of the operation which are running smoothly and meet with our approval. A report of this sort, which is specifically intended to recommend improvement, must of necessity dwell on the weaknesses rather than the strengths of the operation.

Secondly, we relied heavily on the testimony of those appearing before us at public hearings to identify perceived and real grievances with the compensation system. Any public hearing process such as we held, inviting input from all interested parties, will quite naturally draw individuals and groups who are aggrieved or who have a complaint to raise about the system. The thousands and thousands of injured workers who are satisfied with workers' compensation and the way it handled their claims are not the ones to come forward. It is the hundreds who are unhappy, whose voice is heard.

Our methodology of contacting workers regarding the Review may be cited as an example of how negative opinion came forward to public hearings. We did not specifically inform all workers of the hearings, although there was media advertising which fulfilled that role. Rather, we mailed out a notice of the Review to workers who had appealed claims in the past few years. These workers are the ones who have had difficulties with the compensation system, having had to appeal an adverse decision, and whom we needed to hear from in order to evaluate the operation. After all, a part of the test of any such organization is how well it handles the difficult claims. We make no apologies for our procedure; rather, we want it known that we have a perspective on the matter and fully understand that the majority of claimants are quite happy with the Board.

Thirdly, workers' compensation in Manitoba has seen a rapid change in the past six to eight years. The government and Board have dealt with the very major issue of a lack of rehabilitation services—a lack which had devastating effect on the ultimate future of hundreds of disabled workers. First identified as a priority in Dr. Lampe's 1980 report entitled *Workers Compensation in Manitoba: Opportunities for Consolidation and Enrichment*, the need for effective rehabilitation of injured workers was re-emphasized in the Section 100 Committee of 1983 report entitled *Rehabilitation Procedures of the Manitoba Workers Compensation Board*. Both of these reports, commissioned by government, provided instruction and recommendations to the Board to greatly expand and enhance the rehabilitation of injured workers. Within a very few years the Board put together a program which (through staffing and policy development) attempted to meet these recommended initiatives. Again, it is not surprising nor particularly unusual that such massive change carried with it growing pains. We have attempted in our Report to point to the weaknesses which we feel accompany the rehabilitation program, not as a criticism of Board intent or good will, but to provide constructive recommendations for improvement.

It is not only in the area of rehabilitation that the Board has seen such change occur. Until recently, there was a lack of written policy and procedure throughout the entire operation, a lack which caused inconsistency of adjudication and administration. The Board has worked diligently to try to improve and amend this weakness, with commendable if not, from our perspective, perfect results.

Therefore, we trust that those who read this Report will maintain a similar perspective to our own—that the Board has been working very hard and productively at improving an imperfect system. Our criticisms are meant to be constructive in the furthering of this improvement.

Relationship With the Board

Earlier we mentioned our disappointment with our inability to build a trust relationship with the Board. This became apparent early in our appointment as the Committee to review workers' compensation. It was strongly felt by all members of this Committee that the Board considered our mandate to be limited to reviewing the **law**, and not the policies and procedures instituted by the Board, irrespective of the detailed directions contained in our Terms of Reference. While we were aware that one of our mandates was to review the law, both as it exists and as we would like to see it become, we had difficulty in impressing upon the Board the other aspects of our enquiry.

For instance, we asked the Board to provide us with a copy of all policies and procedures of the operation quite early on in our review. Although we did receive a good deal of material, it was in no way complete. And it was only through a very tedious, time-consuming, and tiresome process, mostly through the efforts of Committee member Lissa Donner, that we were able to have some assurance that we had anywhere near a complete set of policies. We do not wish to suggest that there was any motive on the Board's part to withhold such information from us in this instance. The problem seemed more a lack of organization in the area of policy filing and availability. By way of example, there is no alphabetical indexing of policy under subject headings which would allow for ready reference to a particular topic.

In addition to the policies and procedures requested, we wanted copies of the Memoranda of Instruction, the documents which interpret for line staff the policies developed at the Board level. At first we were informed that such Memoranda did not exist in one central location. Finally, through the yeoman effort of certain individuals at the Board, we were able to receive sufficient information about these documents to serve our purpose. Again, we are ascribing no ill intent on the part of the Board regarding this state of affairs. Rather, it speaks more about the need for better organization.

The second area of difficulty between ourselves and the Board arose when we asked them to provide us with raw data in a number of areas. For instance, we were interested in learning where people were being injured (type of industry), what kinds of injuries were occurring, how serious the injuries were, what happened to the worker once injured (i.e. length of time on temporary total disability, numbers referred to rehabilitation, results of rehabilitation, etc.). While surprised to learn that such data required for program evaluation was unavailable, we were more concerned when the Board informed us that we would have to **pay** for the production of this information. This not only put us in a difficult position with respect to our ability to do our work within the allocated budget, it also proved even more difficult because we had promised to share some of this information with other interested parties—information which we were unable to provide. A very uneasy settlement to this difficulty resulted when we reluctantly cut back significantly on the global amount of our request for information, and the Board agreed to share half the cost of developing information which they might also find useful.

It struck us, in learning of the lack of statistical information developed by the Board, that other groups might find such information as useful, or more useful, than our Committee did. For instance, Workplace Health and Safety, mandated to prevent injuries and disease to workers through working with employers and workers in the area of prevention, must find it difficult to target its services to sectors, industries, and firms, without being able to analyze the frequency and severity of injuries occurring in these sectors, industries and firms. Although the Workers Compensation Board currently shares some data with Workplace Health and Safety Division, we are convinced that a more rational sharing of information by the Board to the Division would be beneficial in prevention efforts.

4. **We recommend that the Workers Compensation Board, in cooperation and consultation with Workplace Health and Safety, develop an acceptable data base for use in the prevention of injuries and the early recognition of occupational diseases.**

The culmination of our difficulties with the Board arose from our work in the public hearings. We became convinced, after hearing numerous case histories from injured workers, that it would be necessary for us to review some claim files to see how the system worked in individual cases. We had made it very clear to all who appeared before us in public hearings that we were not an appeal body and would not intervene in individual cases. Rather, we explained to people that their case histories would assist us in discovering the shortcomings and needed reforms to the system. Nonetheless, we felt it vital to link the process of hearing a worker describe his/her difficulty with the Board, be it a matter of law, policy or procedure, to the file held by the Board on that worker.

We used the simplest of expedients to effect our request—we asked the Board for access. After some delay, the Board informed us that although it was in its power to allow us to see such files, we were to be refused permission. Apparently the Board was concerned about potential lawsuits if they opened files to us. In short, they could let us see the material, but would not.

Such a situation was untenable for a Committee appointed to do a thorough review of workers' compensation. While we had the option of approaching workers, individually or en masse, and asking for a written consent form in order to access their files, we rejected such an option both for practical reasons and for reasons of principle. The practical reasons related to our desire not to mislead or build false hopes in any injured worker that we would be looking at his or her claim. Our reason in principle was that any Committee expected to do a thorough review should have access to **all** files and records without question.

In any event, we requested that the government consider making legislative change which would enable us to see the files; an amendment was put before the Legislative Assembly and received unanimous support.

Our own experience in trying to get information from the Board recalls a common complaint voiced in public hearings—that the Board is not open enough in dealing with the public. Nowhere did this Committee receive such a sense of how much difficulty this causes as we received when touring northern communities, isolated as they are from the Board by the linear restrictions of miles and by the time restrictions of the mail. We heard from various parties, more numerously Trade Unions, on how difficult it was to service their members' complaints about workers' compensation, when the most natural and immediate method of communication, the telephone, is virtually useless. Union Representatives explained their difficulty as follows:

> A member comes to the Union office and complains they were hurt four weeks ago at work, filed for compensation, and have yet to receive a cheque. I call the compensation board, ask what the problem is, and am told that I cannot receive any information unless I first send a signed release form from the worker authorizing the Board to give out information. The Board mails me a release form which takes several days, I have to have the member come

> to the office to sign the form (maybe a few more days), I then mail the form back to the Board, which takes a few more days. After delaying the matter for a week to 10 days, I am informed by the Board that the reason the claim has not been paid is that they are awaiting the medical report. I call the doctor's office, they find the report and mail it to the Board. If we lived in Winnipeg this could have been handled in a day. Because we live so far from the Board office, it takes us an unacceptably long time. [The above is a summary of the various presentations made on this problem by presenters outside of Winnipeg.]

We believe that any impediments placed in the path of rural or smaller urban centre residents of Manitoba to equal treatment with Winnipeg residents is wrong.

Returning to our relationship with the Board, we had thought that when the Legislature unanimously supported the amendment granting us full access to all files, our difficulties would be over. Unfortunately, such was not the case. Mentioning only two examples, we learned of the existence of a document which we needed to round out our analysis of the Board's financial situation. The Board was reluctant to provide us a copy of the document and it required clarification of intent of the legislative amendment at the political level in order for the Board to comply with our request. Secondly, another internal Board Report came to our attention. When we met with staff of the Board and requested the document, we were refused on the grounds that only the Board could make the decision to release such material, even though the legislative amendment provided specific direction to the Board and **staff** to comply with our requests for information. The Board, to its credit, immediately provided the requested document.

It is fair to say that our reactions to these difficulties resulted in some anger and frustration. Throughout our enquiry we received full support and cooperation from the government, including the passage of a special amendment to the *Act*. However, the Minister responsible for Workers Compensation had to be circumspect in not issuing any direct orders to an independent board. Therefore, we encountered the difficulties outlined and remain concerned as to the reasoning of the Board.

Management at the Board

Our meetings with Board staff and personnel led us to the belief that there are morale problems related to uncertainty and lack of clear lines of authority. While not able to measure the extent of this problem based on some two score interviews in an organization with a staff of over 200, it is clear that our presence was disconcerting to the majority of those with whom we spoke. This is unfortunate, in that we had hoped to gather new ideas and thoughts regarding workers' compensation from those on the front lines. What we gained instead was a sense that Board personnel needed reassurance and support in performing their complex and difficult work.

We are able to say that the vast majority of Board staff are honest, hard-working and dedicated. It is the responsibility of the management of the Board to utilize these strengths by providing adequate staff education and training programs as well as clear descriptions of job duties, performance evaluations and positive support.

Philosophy

We learned a great deal about workers' compensation from those who participated in our public hearing dialogue. We learned that everyone involved—employers, workers, government, and the compensation administration wants an efficiently-run operation with speedy decisions being issued on all claims filed with the Board. This desire for speed and efficiency lies not only in the area of appeals of adverse decisions, important as that is to the system, but also at all other levels of decision-making. Elsewhere in this Report we have made specific recommendations for adding speed to the appeal process. As well, we have made recommendations for more efficient handling of claims at the front end when they are first filed, and in the middle as they are being processed.

This wish for speed and efficiency cannot, however, be attained without the cooperation of all parties in supporting the basic workers' compensation philosophy, that it is an inquiry system rather than an adversarial one.

By an enquiry model, we mean that no one has to prove his/her case, for or against, in the workers' compensation system. Rather, through the cooperation of employers and workers, when a work injury occurs there is a joint filing of forms to claim for compensation. Such a claim should and must be processed immediately, with an absolute minimum of investigation or control. Since this type of unquestioned claim makes up the vast majority of the 54,000+ claims filed in Manitoba (1986), it is absolutely essential that the Board rely on the self-policing of the system by workers and employers. To do otherwise would grind the machinery to a halt. If there are concerns with fraud control, we would far rather see the matter handled through quality control measures than through holding up this bulk of claims which must flow through the system smoothly.

Some claims, however, do not fit into this mold of unquestioned and easy case. It may be that either the worker, the employer or the doctor has some doubt about a claim being legitimate, either under the legal definition of what constitutes a work injury, or through a questioning of the facts surrounding the injury. It is **not** the reponsibility of the worker to prove that s/he has a valid claim. Alternatively, it is **not** the responsibility of the employer to prove that the worker has an invalid claim. Rather it **is** the responsibility of the workers' compensation system to make sufficient inquiry into the claim, through investigation using internal and external experts, to determine whether a legitimate claim has been filed.

The Manitoba Workers Compensation Board does not presently run an enquiry system. Both workers and employers gave us numerous examples of situations where they were expected to prove either that they had a valid claim or, alternatively, that a worker did not have a valid claim. **These are functions of the Workers Compensation Board,** not the worker and employer. In view of our strong feelings in this regard, it will be noted throughout our recommendations that we try as much as possible to leave both the law and the administration of the law non-adversarial.

Having emphasized the self-policing and non-adversarial nature of the workers' compensation system as a basic philosophy in leading to many of our recommendations, we turn to the other main impetus behind our recommendations—the need for self-determination on the part of injured workers. It would be difficult to list the number of individual injured workers who came before us at hearings with a case history which dealt with this issue of self-determination. Certainly, the majority of people we spoke to, although perhaps not expressing it in so many words, wanted to have their **rights** to compensation clearly spelled out in law and by the Workers Compensation Board, so that they could get on with the important business of making decisions about their lives. This Committee believes that injured workers are not only able to handle responsibility, they are also willing to accept responsibility for their futures.

What do we mean by the issue of self-determination? Perhaps some of the more obvious points which arose in our discussions with workers and employers will assist in an understanding of what we mean.

To begin with, workers felt that many of the employees of the Board treated them condescendingly or used the possibility of termination in order to affect expected results from the worker. We are not naive enough to pretend that some workers don't need motivation. Indeed, a traumatic work injury is just that—traumatic. It can lead to self-doubt and fear on the part of a worker as to whether a return to useful and productive employment is possible. Positive reinforcement and support is needed to motivate and bring workers to the point that they are willing to resume paid employment. Therefore, we note a complaint about the attitude of some of the staff at the Board.

Related to the complaint about attitude was a concern expressed by many as to the authority certain staff lack in the Board structure. For instance, a common complaint by both workers and employees of the Rehabilitation Department, is that counsellors lack the means to produce a jointly agreed-upon plan of action. A worker and a counsellor, who have likely spent many hours discussing possible options for eventual re-employment, may agree upon a most-favoured course of action only to see the plan evaporate when presented to management for approval. It is wrong for a compensation system to encourage high hopes in an injured worker and then let the worker down because lines of authority extend too far down the organization for consistent decision-making to occur. We spoke to many workers who had received rehabilitation assistance for many months, indeed years in certain cases. A common complaint of these workers was that while the worker and the counsellor could agree on a joint plan of action leading to an eventual return to work, the plan was vetoed when it went to management for approval.

5. **We recommend that Workers Compensation Board staff be given continuing training in the area of human relations, so that their contact with injured workers and employers be carried on as smoothly as possible.**

Continuing the examples of the self-determination issue which concerned us deeply, we noted too much Workers Compensation Board involvement in both the choice of treatment and the choice of doctor which a worker is allowed. Specific examples of the Board's over-involvement in the lives of workers are many. For instance, we were shown correspondence from the Board to a worker, which said benefits would be terminated unless surgery was undertaken. Further investigation on our part led to the discovery that surgery was only one option among several available to the worker in order to achieve hoped-for recovery. We are not suggesting that the Board continue indefinitely to pay a worker who refuses to undergo recommended treatment. However, when several options are available, the decision as to which treatment to take should be between the patient and the doctor. If the Board wishes to intervene, we have a set of recommendations which outline what its involvement should be in seeking an independent second opinion.

Another example of Board involvement in worker treatment which we consider to be improper is in the example of workers exposed to lead. When workers who have been exposed to high levels of lead in the workplace reach a certain level of lead in their blood, they are required to be removed from employment for health reasons. The Workers Compensation Board has had a practice of referring all such workers to a single specialist who is in charge of the treatment. Some workers have, under the Board's direction, undergone a process known as chelation, which may not have been universally accepted as suitable in their cases. Other physicians would recommend simple removal from the leaded environment, and time away from working with lead as the best treatment. While this takes longer, it does not carry with it the attendent risks of chelation. Again, we believe that when several treatments are equally valid, the choice of treatment should lie with the worker and his/her doctor. (The Board has changed its policy on leaded workers since we held public hearings, and the above illustration may not be entirely reflective of current policy.)

Finally, as a last example of lack of self-determination, we point out that workers are not always allowed to freely choose their doctor or health professional. This may come into play if a worker wishes to change doctors more than once, or when a worker wishes to use the services of a chiropractor. While we have identified the need and right for the Board to seek independent second opinions when necessary as a means of control, the worker should be allowed to choose from among those treating professionals licenced to practice in the province.

6. **We recommend that workers be allowed to choose their treating professional as well as their treatment.**

A third area which struck Committee members as being out of place in a compensation system is the required relocation of workers by the Board. Two examples should suffice in order to make our point. One worker came to our hearings and reported that after a very serious injury he had moved back to his home province in Atlantic Canada to be near his family and friends during his recovery. Being left with a permanent disability, this worker felt some retraining would be helpful in his long-term employment interests. When he was nearly well enough to consider a return to work, he received a call from the Compensation Board, promising rehabilitation (retraining) and suggesting a reduction in benefits if he refused. The worker, therefore returned to Manitoba with his family. But instead of the promised retraining, he was sent out to look for work in Winnipeg. He was still doing so many months later when we saw him and, needless to say, he was very distraught.

Readers should be informed that an agreement exists between all compensation boards in Canada for joint cooperation and assistance for the claimants of another board. We are convinced that this worker would have been better off and more successful in his rehabilitation if allowed to remain in the province of his choice.

Another example involves a woman who told our hearings how she and her husband had both worked in a small town in Manitoba. After a work injury and plateau recovery, this woman was informed that she would have to move to Winnipeg, leaving her husband and her home, or risk losing all compensation. Other examples exist, but we believe the point has been made. Generally, the compensation system does not acknowledge the right of workers to choose where they wish to live and work. The need for the Board to ask a worker to move is covered in the Rehabilitation section of this Report, but generally we recommend as follows:

7. **That the worker has the right to choose his or her place of residence.**

A fourth problem in the area of self-determination occurs when workers who have been recovering for some length of time, or who have been receiving rehabilitation benefits for some length of time, wish to have a vacation or an out-of-province trip. The Compensation Board, in several examples which we noted from the case histories laid out to us, insisted upon having control in these areas to the point of terminating payments if a worker does take a vacation while on benefits. Let us state an obvious point: the process of recovery often involves both the physical and the emotional well-being of the worker. If a vacation or out-of-province trip is not going to interfere with medical treatment and recovery or with a specific plan of training or an employment interview, we feel that a vacation or trip would be helpful rather than harmful to the interests of both the worker and the Board

8. **We recommend that workers be allowed to have vacations and out-of-province trips as a right, so long as it does not interfere with their treatment or rehabilitation.**

A fifth example of the system removing from workers a basic self-determination about their lives comes in the area of the Board refusing lump sum payments of pensions. Dating back to the days when administrators felt that workers were incapable of handling large sums of money, the practice of refusing to pay out a pension should cease in most cases. We believe that most workers are perfectly capable of wisely handling a lump sum and should have the right to receive their pension in this way, rather than monthly. We have some qualms about the Board paying a lump sum in cases of head injury where brain damage is caused, but favour the self-determination of workers to do what they wish with their awards, rather than having an administrative body make choices for them.

9. **We recommend that the Board allow workers to receive their permanent impairment pensions by way of lump sum rather than monthly payment, save in exceptional instances.**

A sixth example of Board involvement in what we believe are private matters to the worker's sense of determination comes when the Board insists on reviewing the worker's income tax records . Although authority to do this is not contained in the *Act*, a letter accompanying such requests by the Board suggests possible negative consequences. In cases where the Board has reason to believe a fraud may have been committed, for example when workers seem to be earning beyond what they say, an investigation may be necessary. However, it is more damaging to the privacy of the worker and the relationship between the worker and the Board, to routinely insist upon seeing such records as Income Tax returns than it is to put some greater reliance on worker credibility.

10. **We recommend that the Board stop insisting on access to a worker's private Income Tax returns as a matter of course.**

A seventh example of our concerns about self-determination comes from the area of Medical Aid payments. For instance, the Board has set firm criteria on when it will pay the expenses for a spouse to travel to see a very seriously injured worker, and on what provisions they will make for providing babysitting to such a spouse. Workers are not always paid travel expenses as a matter of right when they travel on Board-sponsored business (medical and rehabilitation). Rather, they must make a request to get payment.

Finally, we will comment on a matter less quantifiable than those preceding: the fact that workers perceive they lack credibility with the Board. We earlier outlined how important it is that the compensation system be non-adversarial and, to a large extent, self-policing. We were struck by the hundreds of workers who came before us, convinced that the Board did not believe them and required investigations to find corroborating evidence for injury occurrence, recurrence or worsening. A system which must handle the many thousands of claims that workers' compensation is required to handle, must put its first reliance on the testimony of the first party to the injury—the worker. If there are valid reasons, either in the employer report of injury or the medical report of injury, for doubting the credibility of the claim, an investigation is in order. But for the Board to investigate simple claims for injury, merely because the worker was the only one present at the time, throws the system into doubt, leading as it does to problems between the workers and the Board, and to delays in claims processing.

11. **We recommend that the testimony of the worker in simple claims be given far more credibility by the Board than is apparent at the present time.**

Elsewhere in the Report we have mentioned other examples of this issue of self-determination, two examples being in workers not being allowed to have any choice in their rehabilitation plan, and in instances where lay personnel at the Board recommended that a psychiatric or psychological assessment be carried out on the worker. All of these points add up to one thing—that workers are not being given an adequate voice in determining their present and future following a work injury. We believe that workers can be responsible. We believe the examples we have given show that the system tends to remove this sense of self-determination and replace it with one of Board-determination. While workers' compensation must have sufficient controls to make sure that recovered workers return to work rather than stay on compensation, we believe that the system must always treat workers with respect and dignity in order to ensure a harmonious, efficient and humane system.

As we have outlined, many of our recommendations derive from a desire to do two basic things with the compensation system—to make sure that it becomes and stays as non-adversarial as possible, and to grant a basic self-determination to workers along with providing them responsibilities.

These two desires were not the focus of the Report in its early stages. Rather, it was after having met and discussed workers' compensation with hundreds of groups and individuals that we realized that basic reform was necessary. We would have liked, for instance, to have spent a good deal more time on philosophy and program design. We found, however, as we went through the law, policies and procedures of the workers' compensation system, that more commentary on issue-related matters was needed. Therefore, our Report has clearly been influenced by what we saw and what we saw as the problems. Hopefully, if our two main points are accepted and acted on, a future Review Committee will be freed to deal with some of the issues we may have fallen short on.

CHAPTER 3

THE HISTORY OF WORKERS' COMPENSATION IN MANITOBA*

I. INTRODUCTION

A no-fault workers' compensation scheme, in one form or another, has been an integral part of Manitoban reality for seventy-five years. One of the very earliest pieces of legislation regulating an aspect of the relationship between labour and employers in this province, workers' compensation has had a history characterized by two notable features: a strong, ongoing tradition of consultation and cooperation among labour, employers and government, and the degree to which change in the scheme has reflected evolving social and legal values in a society making the transition from rural to industrial to modern welfare state consciousness.

An overview of the history of workers' compensation in Manitoba is offered here in an attempt to discover whether there has been over the course of the past seventy-five years with all its attendant change, a divergence from the original purposes and goals for which workers' compensation was established.

II. MASTER AND SERVANT: THE OLD COMMON LAW

One cannot, of course, understand the original purposes and goals of workers' compensation without knowing the state of the common law which preceded its establishment.

The common law of "master and servant," as it had developed by the last half of the 19th century, was decidedly stacked in opposition to an injured worker. The employer's duty to provide reasonably safe working conditions arose by virtue of the existence of the contract of employment with the worker. A worker injured on the job had to sue the employer in court for breach of contract and prove the employer's negligence in breaching the contractual obligation.

Quite apart from any difficulties there may have been in proving negligence, the common law provided the employer with a series of defences which effectively ensured that very few workers' suits could be successful. Briefly, the three most pernicious defences were:

1) ***contributory negligence:*** if the worker had also been negligent, no matter in how infinitesimal a degree, the entire suit was barred and no recovery at all could be had.

2) ***common employment:*** if the negligence was committed by a fellow employee, the suit was barred. The employer was not fixed with any vicarious liability for the acts of his employees toward each other. This harsh result was a logical consequence of contract law. Since the worker had to sue on his/her contract with the employer, the actions of anyone who was not a party to that contract were irrelevant.

3) ***assumption of risk:*** it was a virtually unchallengeable legal doctrine that, in "freely" contracting with an employer, the worker agreed to accept all the standard risks inherent in the performance of the job. Thus, any status quo (for example, dangerous machinery) was legitimized in law, right from the start of the suit.

As may be easily imagined, the undertaking of a suit against an employer was a formidable decision to reach. Compounding the legal difficulties were the practical difficulties involved: how could an injured worker support his/her family while the case slowly wound its way through the coils of the legal system? Where could the injured worker obtain money to pay legal fees? (A solvent employer could fight a case through at least three levels of trial and appeal.) And would the expense of hiring lawyers negate any damages that might be recovered?

By the end of the 19th century, the first statutory response to this situation had occurred. Following Britain's lead, "Employers' Liability" statutes were enacted by many jurisdictions throughout the then Empire, and Manitoba was no exception.[1] These statutes basically modified and sharply defined the common law defences available to employers, but left unchanged the necessity of suing in court and proving negligence. The ineffectiveness of such statutes to deal with the increasing social problem of industrial accidents was acknowledged by their replacement, in the early 20th century, with no-fault workers' compensation schemes.

III. THE BEGINNING OF NO-FAULT WORKERS' COMPENSATION IN MANITOBA

Workers' compensation as we understand it today is, of course, characterized by one main legal feature: the substitution of the no-fault principle in place of the common law necessity of proving fault or negligence. The no-fault principle was, and is, a radical departure from all that underpins our legal system, and was pioneered in Britain and Germany.

The no-fault principle first appeared in Manitoba in *The Workmen's Compensation Act, 1910.*[2] This statute essentially provided a choice for injured workers: they could sue at common law, or they could forego their right to sue in return for no-fault benefits under the *Act*; they could not, however, do both. The benefit levels were low (25 per cent of wage loss in the first month of incapacity, 40 per cent in the second month, 50 per cent thereafter). It was not a compulsory insurance scheme; employers were expected but not obliged to insure themselves privately in order to be able to make benefit payments. This being the case, no administrative board was established to administer the *Act* —disputes were to be settled by arbitration.

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*The conclusions to this chapter, prepared by our researcher, reflect an interpretation of history not necessarily shared by all Committee members.

However, even such a limited recognition of the no-fault idea represented a major step. The procedure by which it was achieved, established the way in which all subsequent advances in workers' compensation would be reached.

A tripartite Royal Commission was established in 1909 to investigate into and report upon the industrial accident scene in Manitoba. Chaired by Judge Corbet Locke, the Commission included Arthur W. Puttee as labour representative, and Thomas R. Deacon as industry representative.[3] Public meetings were held between October 1909 and January 1910, in Winnipeg and Brandon, for the presentation of briefs from labour and industry organizations.[4] Statistics on industrial accidents were solicited by mail surveys to 250 businesses from which a paltry response of 59 was received.[5] Nor apparently did the Commission receive the number of briefs it had anticipated from industry; a distinct note of annoyance about this point runs through the Commission's final report.

The Manufacturers' Association of Manitoba and the Builders' Association of Manitoba were, however, active in advancing the views of business, as were the Trades and Labor Council and various unions for the employees.

On the specific issue of no-fault benefits, the main fear of employers appears to have been not the principle itself, but rather that Manitoba should not enact it until similar legislation had been passed by all provinces (and especially Ontario) from which business competition was to be expected, so that Manitoba's ability to attract industry would not be prejudiced.[6] The Commission, however, was unanimous in its opinion that this feared prejudice was "perhaps overestimated."[7] On the whole, employers were much more concerned that workers must be made to choose only one of the two possible legal remedies, and that the carrying of private insurance not be made compulsory.[8] The labour groups, even then, were strongly advocating compulsory insurance to be administered by the state.[9] The Commission avoided dealing with the issue of state insurance in its report by stating that there was insufficient data on this issue to formulate a policy recommendation.[10]

The Conservative Roblin government, which had successfully killed similar bills in three previous sessions of the legislature,[11] gave effect to the Commission's major recommendations but continued to distance itself from the idea of workers' compensation by having the measures passed as a private member's bill rather than as a government initiative.[12]

After a couple of years' operation, the full significance of the nature of the no-fault principle began to make an impact on the business community's consciousness. It is interesting to note that, in 1913, when labour was lobbying the Roblin government to improve no-fault benefits,[13] the Canadian Manufacturers' Association and the Builders' Exchange were prepared to acquiesce to such improvements:

> if it would be possible at the same time to introduce a clause only making the act operative where there was negligence on the part of the employer.[14]

The contradictory nature of this position, however, must have been brought home to the employers' associations because no further representations were made along these lines, and they eventually agreed with labour that no-fault benefits should be increased to a straight 50 per cent of wage loss.[15] This was the major change in the 1913 re-enactment of *The Workmen's Compensation Act*.[16]

IV. 1916: THE ADOPTION OF FULL-FLEDGED NO-FAULT WORKERS' COMPENSATION

The three most significant factors in Manitoba's adoption of a "full-fledged," i.e. mandatory, no-fault workers' compensation scheme were: the booming industrial and population growth of Winnipeg in this period; the fall of the Roblin government in the legislative buildings construction scandal, followed by the election of T. C. Norris' Liberals; and (probably most importantly) the recent adoption by Ontario of the most comprehensive workers' compensation scheme to date, following the recommendations of the famous Meredith Report.

In contrast to the situation under the Roblin government, amendment of *The Workman's Compensation Act* was one of the new Liberal government's own priorities. No time was lost in establishing a legislative committee, to meet with labour and business for their input and to draft a bill.

In terms of the no-fault principle, the proposed new *Act* followed Ontario's lead in specifying those classifications of employees to whom the *Act* applied, removing completely their right to sue at common law, and substituting therefor the no-fault compensation scheme at 55 per cent wage replacement. No longer would workers have a choice as to remedy. The social reasons for the adoption of a full-fledged, no-fault system included not only the desire to avoid expensive litigation and to provide speedy income replacement, but included such other considerations as:

> Many [injured workers] fall into the hands of a certain type of shyster lawyer, who take their cases on the chance of winning out and get most of the compensation themselves if they win.
>
> Others, dreading to take a chance in the courts, or being in need of immediate cash because of their injuries, accept a much smaller amount than is their due from the employer or insurance company, thus being deprived of the meagre allowance provided by the act.[17]

The big issue of 1916 was not the no-fault principle; the sore point between labour and industry was whether the system should be funded by compulsory private insurance or by state insurance. No one seriously contended for a continuation of the voluntary private insurance method.

The Ontario model provided for what was called compulsory "state insurance." A term more accurately describing the Ontario model would be "compulsory mutual insurance," for the compensation benefits would be drawn from a pool of compulsory assessments paid by employers and administered by a board.[18] Most people appeared to use the term "term insurance" in this limited sense. Some people used the term "state insurance" correctly, meaning that if the Accident Fund should be insufficient, the board would have access to the public purse of the province.[19] Because of this confusion, it was not always clear exactly what people were advocating when they called for compulsory state insurance.

But in any event, both industry and the government asserted that the Ontario model of "state insurance" would not work in Manitoba, since our province had a much smaller industrial base plus smaller-scale employers and, therefore, could not properly distribute the risk.[20] The government opted instead for a novel and experimental system of compulsory private insurance, with a government-created board to handle the administration of claims between workers and the insurance companies.[21]

The Liberals also used the private-member route to introduce the new scheme.[22] J.W. Wilton, a newly-elected but eloquent backbencher, drafted the bill and shepherded it through the House with almost proprietary concern. The measure was criticized and opposed for its lack of state insurance by the two Labour members of the Legislature—R.A. Rigg and Fred J. Dixon. These two men prolonged the debate, which soon grew acrimonious over the state insurance issue. Following Rigg's charges that the workers' compensation bill looked like "'something the cat brought in,'"[23] it was reported that

> J.W. Wilton ... is a very much disgusted individual. Mr. Wilton says he has worked overtime on his Workmen's Compensation Act with a heart overflowing with love and kindness toward the labor people and now the labor men have spurned his efforts to protect them.[24]

Although "[l]abor circles are seething with discontent ... [and] are of the opinion that the government has given them the 'double-cross,'"[25] labor leaders ultimately, of course, as a practical matter, compromised temporarily in favour of compulsory private insurance, since it was better than nothing. The government was, however, put on notice by Harry Veitch, president of the Trades and Labor Council, that:

> we may be forced to put up with insurance by private corporations, but we will never be satisfied with that plan, neither will we cease our efforts and representations until state compulsory workmen's compensation insurance is an accomplished fact in Manitoba as in Ontario.[26]

While losing on the state insurance issue, R. A. Rigg did succeed in having occupational diseases included in the *Act* as a basis for compensation. J. W. Wilton explained that they had been omitted when copying the Ontario *Act* because occupational diseases "do not prevail in this province, so far as he knew."[27] In fact, Wilton disdained the Meredith Report as mere mindless copying of the British list of occupational diseases—"Judge Meredith...might just as well have included bubonic plague or other diseases which were not a menace."[28] Perhaps because of this flippant disdain, the amendment was quickly granted.

The Manitoba *Act* went beyond its Ontario equivalent in providing for immediate medical care benefits of up to $100 in order to guarantee immediate relief of the injured. The burial expense of $75 remained the same as in Ontario, even though it was patriotically asserted that "'a Manitoba funeral ought to be a little more respectable than an Ontario funeral.'"29 A more drastic amendment to extend compensation for accidents occurring while going to and from work was defeated, Rigg and Dixon being its lone supporters.[30]

The *Act* was given third reading in the House in a general air of self-congratulation and mutual commendation for the spirit of cooperation and compromise which had prevailed between labour, business and government. All party members recognized that "[a] great step had been taken, but it was by no means considered as the last step."[31]

V. THE TRIUMPH OF STATE INSURANCE

The new scheme came into effect on September 1, 1916. Before two years had elapsed, a Royal Commission was investigating the administrative practices of the Board. The Fallis Commission reported: that there was a general disregard for economy by the Board in acquiring space, telephones and staff; that no records were being kept; that premiums had been arbitrarily and unjustifiably raised by 10 per cent; that Board staff were being paid too much for too little work; and that there was a general lack of organizing ability on the part of the administration.[32] There was also the criticism that:

> the employees and officials of the board... have not extended the courteous and sympathetic treatment which might be expected and which would be conducive to bringing about the friendly feeling which should result from the administration of the Act.[33]

The government revamped the structure of the Board and reduced salaries. Otherwise, the system was working smoothly in meeting its purposes and goals.

> In so far as the employers and employees are concerned they are perfectly satisfied with the principle of the Workmen's Compensation Act," said J. B. Hugg, representing the Manufacturers and the Builders exchange... "The only criticism that has been made is in regard to administrative details which is the object of the [royal] commission. One of the largest employers of labor in the city stated to me that his company would not under any consideration return to the old state of things.[34]

The cooperation between labour, industry, and government, which is a hallmark of workers' compensation in this province, was perhaps never so clearly demonstrated as in the belated adoption of state insurance in 1920. Winnipeg had just come through the emotional and divisive General Strike; the strike leaders were in the process of being tried and sentenced despite the outrage of labour and some of the general public. If this atmosphere was not sufficiently unsettling, the King's Bench had just held the entire workers' compensation system to be unconstitutional, and for a month uncertainty reigned until the Court of Appeal declared it to be legal after all.[35]

In this atmosphere, the Norris government called a conference to be amply attended by labour, industry and government representatives.[36] It brought in actuarial and workers' compensation experts from New York and British Columbia, who recommended state insurance as being cheaper for employers and more beneficial for workers, since benefits could be raised through this more efficient use of assessment monies, without additional expense to the employers.[37]

The insurance companies, already squeezed out of Ontario and other provinces, had something to say about all this, of course. State insurance would be:

> another burden laid on the middle class, now being crushed between the upper and nether millstones, or as graphically expressed by W. H. McWilliams, in between hell and the iron works.[38]

But their arguments no longer fell on receptive ears. With apparent ease, all parties agreed on the wisdom of state insurance. As the Attorney-General, T.H. Johnson, stated in the House while summing up the basis for the tripartite agreement:

> It was perfectly plain . . . that [private insurance] companies, in writing this business, were not doing that for their health—to use a common expression. They were doing it for profit and consequently the joint conference, being aware of that, sought a way to divert the profits from the companies to the pockets of the man injured in the course of his employment. The result was that there would be greater compensastion for those who were injured with no greater burden upon industry and very probably less.[39]

The wage replacement rate was raised to the national standard of 66 2/3 per cent, the pensions of widows and children were increased, and the limit on medical aid was removed completely.[40]

Fred Dixon, fresh from his acquittal on charges of seditious libel for his role in the General Strike, had the satisfaction of reminding the Liberals that he had argued for precisely such measures in 1916, but that "it had then been said such things were impossible."[40]

Thus, in 1920, the workers' compensation format took on the final element of the basic scheme which continues to operate today.

VI. WORKERS' COMPENSATION UNDER THE BRACKEN ADMINISTRATION

The workers' compensation system was not dramatically altered during the years of the premiership of John Bracken, who led, first his United Farmers in 1922, and then a succession of coalition governments until 1942 when he moved to federal politics as leader of the Conservative party.

Any changes made, continued to be those having the support of both labour and industry. These years of depression and war, however, truned out to be years of social and political retrenchment following the progressiveness which had characterized Winnipeg and Manitoba prior to the General Strike. It was not often that labour and industry agreed on any change beyond "tinkering" with the workers' compensation system as it already existed.

Throughout the 1920s, the call for more progressive workers' compensation was taken up by the former General Strike leader and current leader of the Labour party, John Queen.

In response to Queen's amending legislation introduced in 1924, the Bracken government appointed a special legislative committee to review the workers' compensation system. The representatives of labour and industry could not agree on any major amendments, despite "repeated but futile efforts."[42] Labour was advocating more generous and far-reaching compensation; industry was urging restraint and retrenchment. The deadlock resulted in the making of relatively minor amendments only, although industry and labour did agreee on a system of vocational training for the injured workers.[43]

The Board itself attracted more atention than the *Act*. An independent investigation into the administration of the Board's affairs was ordered. The government's suspension, pending the investigation's outcome, of Herbert G. Wilson (who had been Commissioner of the Board since its creation) was followed by his tragic suicide.[44] The appointment of Major C.K. Newcombe as Chairman of the Workmen's Compensation Board was attacked by Queen as a political patronage appointment.[45]

Throughout the '20s, Queen continued to introduce amending bills which went nowhere. His 1929 bill proposed to extend workers' compensation to all workers except farm labourers and domestics, and to enlarge the scale of compensation to 75 per cent of wage loss.[46] The same bill had been thrown out the year before, but this year the Bracken cabinet was shaken by allegations of corruption in the Seven Sisters power project, which perhaps caused even government members to support taking an Opposition bill to the committee stage.[47]

Before the law amendments committee, vigorous opposition was mounted by representatives of industry.[48] The government then moved to have the bill considered by another committee during the legislative recess. Queen offered to drop all his proposed amendments if only the government would, this Session, increase widows' pensions under the *Act*, by $10 per month. The government defeated even this motion, after Queen, "in a cold rage,"[49] declared that the entire amending package would add only one-third of one percent onto the assessment rates in any event, but that " '[i]f you make an attack on profits, God help you.' "[50] As the *Free Press* rather sourly noted, his speech may have been made on humane grounds, but it was "tinctured with Karl Marx at its worst."[51]

In the 1930 Session, widows' pensions were indeed raised and some new occupational diseases were added to the *Act*, such as conjunctivitis, retinitis, and dermatitis.[52] The government supported the initiative of labour and business to decrease industrial accidents by means of an educational campaign.

In the 1931 Session, John Queen again introduced his annual workers' compensation amending bill. But this time the Speaker ruled that amendments to the workers' compensation system constituted a "money bill" which could only be introduced by the government, not by private members. Despite the well-known history of precisely such amendments, despite the citation of parliamentary authority, and despite the contrary opinion of the clerk of the federal Parliament, the Speaker confirmed his ruling and the government obtained exclusive control over the initiation of amendments.[53]

In 1936, silicosis was added to the list of recognized occupational diseases under the *Act*, with the concurrence of labour and industry.[54]

Amendments to the *Act* during the Second World War continued to be relatively minor, with the opposition parties (now including the CCF) being the only ones advocating any major changes or increase. The government continued to be satisfied that the Manitoaba legislation was basically as good as any to be had in the country and so should not be tampered with too dramatically.[55]

VII. THE 1950s AND THE TURGEON REPORT

The agrarian and rural nature of the Bracken coalition governments was continued into the 1950s by Bracken's second successor, Douglas Campbell.

Cautious amendments to the workers' compensation system continued, even as post-war Manitoba became increasingly urbanized and industrialized.

The call for progressive reform was now taken up by the CCF. In the 1950 Session, Donovan Swailes of that party was advocating 100 per cent wage replacement, increased widows' pensions and increased ceilings on average earnings.[56] The government advised that it would not be amending the *Act* this session, but that Department of Labour and workers' compensation officials would be reviewing the *Act* and recommending changes in the next session.[57] The Minister of Labour, C.E. Greenlay, told Swailes that the old system of tripartite committee review was being abandoned and, in future, the Act would be amended the same way as any other act.[58] The Trades and Labor Council was notified of this and was presumably displeased, since the Campbell government quickly amended the *Act* at the end of the session, to include some of the less radical positions of labour (such as the authorization of treatment by chiropractors and osteopaths),[59] almost as if to mollify ruffled feelings.

Coverage under the *Act* was extended in 1952 to cover new classes of industrial workers in modern industries such as oil well drilling, cold storage locker plants and plastic material manufacturing.[60]

The most important development of the 1950s was, of course, the appointment in 1957 of a one-person Royal Commission to review thoroughly Manitoba's workers' compensation system and to recommend changes. The Turgeon Commission held public hearings from December 1957 to March 1958, and received much input from organized labour, business, and individual citizens.[61]

Mr. Justice Turgeon made careful note of changing social reality in Manitoba. While Manitoba could not be said to be highly industrialized like Ontario or B.C., still the modern destructive hazards of industry had kept pace with the increasing productive capacity of the province.[62] The development of the modern welfare state, administering public assistance undreamed of in 1916, did not "compete" or conflict with workers' compensation; the operation of one scheme did not threaten the existence of the other.[63] The main reason for this happy fact was that each system was based on its own unique principles which were complementary, not contradictory.

Mr. Justice Turgeon reported that:

> it is, of course, with great satisfaction that I find that Workmen's Compensation has so far fulfilled its mission in Manitoba with success and that, after the 42 years which have seen it at work, there is no desire among any group of our people to abolish it or to introduce vital changes to its organization or its methods of procedure.[64]

He also noted that, while it is "conceded generally" that the Board took a "liberalizing view" of compensation, it could not be said that this liberalization had proven excessive.[65] Moreover, although no Royal Commission had investigated the administration of the Board for over 35 years, there was:

> an almost total lack of criticism made to me concerning the conduct of the Board during the great number of years of its existence.... Usually ... [public] investigations take up some time considering the errors and weaknesses attributed to the Administrative body charged with the responsibilities of the law. This was not the case in this investigation....[66]

Apart from specific recommendations, perhaps the most important and shrewd point made by the Turgeon Report was to stress the growing conceptual and practical importance of accident prevention and rehabilitation. These had been considered secondary, if important, features of workers' compensation almost from the beginning, but their relative importance had since risen greatly. In fact, said Turgeon, they are "the two principal concepts to be looked for in the make-up of an efficient compensation programme,"[67] and it was now the statutory benefits which were secondary, in the sense of being "a necessary contribution to the workman's relief where injury has been occasioned and total rehabilitation is not yet established."[68] The efficient development of these two areas is what would keep long-term pension costs down. Mr. Justice Turgeon was pleased with the fledgling rehabilitation (vocational retraining) department of the Manitoba Board, and his only recomendation on this subject was that special attention should be given in building up the staff and facilities of this department.[69]

The government enacted all the recommendations of the Turgeon Report, including those which extended coverage to clerical workers, wholesale and retail employees, and workers in hospitals, nursing homes, hotels, restaurants and private radio stations.[70] Compensation rates for permanent and temporary total disability were raised and the definition of "accident" was broadened.[71]

The government went beyond the Turgeon Report in raising the pensions of widows and dependent children. Also, by order-in-council, the government created the first medical appeal board to which a party could have recourse as of right to seek an advisory opinion to guide the Board itself.[72]

VIII. THE FINANCIAL EXPANSION AND THE RESULTANT DILEMMA OF THE 1960s AND 1970s

During these two decades, the costs associated with workers' compensation began to rise inexorably, keeping pace with quickly rising wages, inflation, the growing importance of such previously underfunded programs as rehabilitation, and the necessity of upgrading pensions awarded in the past.

In 1962 the Workers' Compensation Board assisted in special studies in the rehabilitation field. In 1963 the government tripled the vocational training fund from $10,000 to $30,000 per year. The other major amendment of the session was to relax the exposure requirement for the compensation of silicosis.[73]

The very next year, the Conservative government removed the $30,000 ceiling on vocational spending and made it open-ended.[74] Pensions awarded in the past were upgraded, and the NDP Opposition was calling for an increase in the ceiling on annual earnings upon which the 75 per cent compensation rate was based.

Such an increase in the ceiling was granted in the 1965 session and it continued to rise steadily and periodically thereafter.

It was also in 1965 that the merit-demerit rating system was created in connection with employer assessments. This amendment was noted by the NDP as constituting a serious deviation from the founding principle of industry-by-industry rating, but the basic principle behind the merit-demerit idea was stated to be worthwhile, although trouble was foreseen unless employers had an appeal process to follow in case of disagreement.[75]

In 1971 the Schreyer NDP government clarified the Board's authority to spend money and take other measures in the field of rehabilitation.[76] For the first time, complaints began to surface in the House about administrative problems at the Board—problems with workers not having access to their own files, problems with the lack of sympathetic treatment received at the Board, etc.

It was in the context of the 1972 and 1974 initiatives of the NDP government that the parameters of the current dilemma in workers' compensation began to emerge.

The1972 amendments represented the NDP government's first major initiative in workers' compensation, coming three years into their first term. The Industrial Relations Committee of the Legislature had held meetings with labour and business, in the time-honoured tradition, and had formulated their mutual views into a proposed bill.

Apart from specific, new amendments such as the creation of a Neurosis Review Panel and a further reduction of the exposure requirements for silicosis,[77] the initiative basically consisted of a general extension of the *Act's* coverage to new classes of workers, plus a general healthy increase in pensions and benefits all around. In the lengthy debate which followed, the Opposition Conservatives all commended the government for the long-overdue increase in benefits. All agreed that low levels of benefits were unfair; all desired to be heard saying so. Yet the first ripples of unease were also being felt. Would this mean an equally healthy increase in assessments on employers?

The government estimated it would cost $5 milllion to upgrade past benefits so they would keep pace with current economic realities. Since it was not entirely fair to expect the current business generation to pay for the easier times of the past business generation, the government would contribute $1 million of public money for this purpose. But of course, increased assessments would also be very likely.[78]

Further general increases were made in 1974. This time there was no prior consultation with either labour or industry.[79] Now the cost of upgrading was estimated at $10 million, with no further public money forthcoming.[80] The Opposition and business realized who would be expected to pay for the past easy times of cheap insurance, when prior governments had kept benefits meagre and assessments low for longer than they should have.

To be fair, Manitoba was and is not alone in having to face up to the fact that such a superficially straightforward plan of wage replacement, means very different cost considerations and cost burdens in the closing decades of the 20th century than in the opening decades thereof. Workers' compensation plans across the country were facing the same dilemma.

IX . THE RESPONSE TO THE DILEMMA

Governments are often accused of simply throwing taxpayers' money at problems. When the money to be thrown belongs to industry, governments are quite rightly more cautious in exploring the situation before the day of reckoning arrives.

The Manitoba government turned its sights on the Workers Compensation Board. The 1980s have thus far been characterized by numerous investigations and reports.

The Conservative Lyon government started the process in the late 1970s by commissioning what has come to be known as the Lampe Report.[81] A tripartite committee investigated and made recommendations on ways to tighten up Board policy and procedure.

The storm broke over the Board in 1981. An assistant claims director publicly charged the Board with mismanagement and unfair treatment of claimants, resulting in his immediate suspension. His cause was taken up by other Board employees and a public scandal appeared to be in the making. The Lyon government commissioned a judicial inquiry to investigate the entire field or workers' compensation.

The NDP decommissioned it upon re-entering office shortly thereafter, explaining that waiting for the result of a lengthy judicial inquiry would prevent immediate responses to the Lampe Report.[82] The NDP instead sent in Inspector D.C. Cooper of the RCMP Commercial Crime Section to investigate.

Cooper's report, released in June 1982, was followed by immediate government action: the Commissioners and senior mangement of the Board were replaced; a private consultant firm (CERECO Inc.) was sent in to aid the new Board and to conduct a management review; a "Section 100 Commitee" was struck to review the rehabilitation program and procedures of the Board; and worker advisors were hired and mandated to assist claimants in pursuing their claims through the system. The major amendments to *The Workers' Compensation Act* during the '80s have concerned the worker advisor program and worker access to claim files.

The CERECO Report, released in two parts in 1983, was especially condemnatory of the Board's management practices.[83] Perhaps its worst revelation, as reported by the *Free Press*, was that:

> Manitoba's Workers Compensation Board has been operating for decades on an uncharted course, without a budget for its $50-million-a-year payments and with no clear and systematic policy directions, a government-commissioned report has found.
>
> "I find it appalling," Jay Cowan, minister responsible for the board, said yesterday in releasing the interim report.[84]

Business and labour leaders were equally appalled.

The investigation process culminated in the 1985 appointment of the present Workers Compensation Act Legislative Review committee, whose broad mandate to review and recommend has of course resulted in the Report which you are currently reading.

X. CONCLUSION

Solving whatever management and policy problems the Board may have will not of course eradicate the fundamental dilemma of modern workers' compensation: it is increasingly expensive to operate on a current basis and is plagued by an unfunded liability problem in regard to past pensions, yet no one can deny that industry, labour and government must continue to address the social problem of industrial accidents. The solution must be legislative.

The argument is more and more frequently being heard that, somewhere along the line historically, workers ' compensation strayed from the fulfillment of its original goals and purposes, and wandered off into an area which should more properly belong to government social welfare agencies.

It is hoped that this overview of the history of workers' compensation in Manitoba will aid in demonstrating the falsity of that view. Since the finalization of the basic system in 1920, there has been remarkably little legislative change that in any way alters its original goals or purposes.

There has been fine-tuning, of course, but no radical departure from fundamental underlying principles. And this fine-tuning was not the result of any one party's manipulation of the goals or purposes, but rather, represents consensus between labour and industry. The desire, itself, to fine-tune the system is an almost inevitable relfection of our society's changing and evolving social and legal views of just and fair compensation for injury.

The old common law at the end of the 19th century was reviewed at the beginning of this Chapter. The common law has not stood still and its development in the area of compensation for personal injury has profoundly affected our social views.

At the time of the creation of workers' compensation, no one could sue for damages for negligent personal injury unless they could prove a contractual agreement not to injure. There was absolutely no legal concept of a duty not to injure that existed apart from contract. Such a concept did not arise until the 1930s in Britain.

There followed a veritable explosion in the law of tortious negligence. It may be said without exaggeration, that no other single area of common law has seen such phenomonal growth in the 20th century. The concept that money can and should compensate us for such unquantifiable intangibles as pain and suffering, entered our social and personal consiousness with a tremendous impact and on a scale never before seen. What person today would question the view, whether or not from personal experience, that if we suffer even a minor injury through another's indirect negligent act, we are entitled to be fairly compensated in full for it? To our grandparents, such a view would have been a legal impossiblity.

And the level of common law damages that has evolved! Million dollar damage awards are not rare in the United States. Even in Canada, the judicially-created ceiling of $100,000 on damages for pain and suffereing is worth nearly twice that much in today's dollars.

In short, the value of that which was surrendered by labour in the "historical compromise" of workers' compensation — damages for pain and suffering — has sky-rocketed in a manner which could not have been foreseen, even by 1920. What labour settled for, in return for giving up their right to sue, was no-fault wage replacement (and not even full wage replacement). The no-fault basis remains the important justifying feature for workers' compensastion, but how meagre does percentage wage replacement now appear to our modern consciousness!

Our legal conception of causation has as well, because of the development of the tort of negligence, become increasingly sophisticated. Causation is not the black-and-white notion it once was. How could this development not be reflected in the workers' compensation field without offending our sense of justice? We have seen its effects, for example, in the conceptual development surrounding occupational diseases, the basic idea of which has historically always been an integral feature of workers' compensation.

So, in conclusion, it has not been the goals and purposes of workers' compensation which have changed. They have remained the same and are as valid today as they ever were. What has changed is our socio-legal view and understanding of those goals and purposes.

FOOTNOTES

GENERAL FOOTNOTE: The term "workers' " compensation has been used throughout this chapter as the generic term for the system, even though it is (strictly speaking) historically inaccurate much of the time. The term "workmen's" compensation has been retained only in direct citations from historical source material; for reasons of readability the notation "sic" has not been used when so citing. As well, the historically correct (albeit Americanized) spellings of "labor" and "Trades and Labor Council" have been retained when necessary, without the "sic" notation, although the proper British spelling of "labour" has been used generically.

1 *Workmen's Compensation for Injuries Act*, S.M. 1893, ch. 39, as am.; *The Employers' Liability Act*, R.S.M. 1913, ch. 61.

2. S.M. 1910, ch. 81.

3. *Manitoba Morning Free Press*, Vol. 37, No. 52 (September 4, 1909), p. 17.

4. Manitoba. Royal Commission on Workmen's Compensation, 1910. *Report.* (Winnipeg, King's Printer, 1910), pp. 635, 637.

5. *Id.*, p. 645.

6. *Id.*, p. 647. *See also: Manitoba Free Press*, Vol. 37, No. 133 (December 8, 1909), p. 6.

7. *Supra*, n. 4, p. 647.

8. *Ibid.*

9. *Manitoba Free Press*, Vol. 37, No. 163 (January 12, 1910), p.7.

10. *Supra*, n. 4, p. 648.

11. *Manitoba Free Press*, Vol. 37, No. 192 (February 15, 1910), p.6; *Manitoba Free Press*, Vol. 13, No. 138 [sic] (March 16, 1910), p.5.

12. *Manitoba Free Press*, Vol. 37, No. 208 (March 5, 1910), p.1;
Manitoba Free Press, Vol. 37, No. 209 (March 7, 1910), p.4.

13. *Manitoba Free Press*, Vol. 40, No. 160 (January 8, 1913), p. 22.

14. *Manitoba Free Press*, Vol. 40, No. 160 (January 15, 1913), p. 9.

15. *Manitoba Free Press*, Vol. 40, No. 186 (February 7, 1913), p. 7.

16. R.S.M. 1913, ch. 209.

17. *Winnipeg Evening Tribune*, Vol. XXVII, No. 16 (January 19, 1916), p. 5.

18. *Manitoba Free Press*, Vol. 42, No. 188 (February 10, 1916), p. 6.

19. *Manitoba Free Press*, Vol 42, No. 190 (February 12, 1916), p. 11.

20. *Supra*, n. 18.

21. *The Winnipeg Telegram*, No. 11 (February 15, 1916), p. 8.

22. *Manitoba Free Press*, Vol. 42, No. 178 (January 29, 1916), p. 4.

23. *Winnipeg Evening Tribune*, Vol. XXVII, No. 36 (February 11, 1916), p. 2.

24. *Winnipeg Evening Tribune*, Vol. XXVII, No. 42 (February 18, 1916), p. 5.

25. *The Winnipeg Telegram*, No. 311 (January 31, 1916), p. 1.

26. *Id.*, pp. 1,2.

27. *The Winnipeg Telegram*, No. 9 (February 12, 1916), p. 4.

28. *The Voice*, Vol. XXII, No. 35 (February 18, 1916), p. 4.

29. *The Winnipeg Telegram*, No. 28 (March 6, 1916), p. 5.

30. *The Winnipeg Telegram*, No. 27 (March 4, 1916), p. 1.

31. *Manitoba Free Press*, Vol. 42, No. 211 (March 8, 1916), p. 9.

32. *Manitoba Free Press*, Vol. 44, No. 176 (January 26, 1918), p. 8; *Manitoba Free Press*, Vol. 44, No. 186 (February 7, 1918), p. 8.

33 *Manitoba Free Press*, Vol. 44, No. 186 (February 7, 1918), p. 8.

34. *Manitoba Free Press*, Vol. 44, No. 176 (January 26, 1918), p. 8.

35. *Kowhanko* v. *Tremblay*, [1920] 1 W.W.R. 481 (Man. K.B.), rev'd: [1920] 1 W.W.R. 787 (Man. C.A.).
See also: *Manitoba Free Press*, Vol. 46, No. 168 (January 24, 1920), p. 1;
Manitoba Free Press, Vol. 46, No. 196 (February 26, 1920), p. 3.

36. *Manitoba Free Press*, Vol. 46, No. 170 (January 27, 1920), p. 1.

37. *Manitoba Free Press*, Vol. 46, No. 188 (February 17, 1920), p. 5;
Manitoba Free Press, Vol. 46, No. 189 (February 18, 1920), p. 7;
Manitoba Free Press, vol. 46, No. 196 (February 26, 1920), p. 3.

38. *Manitoba Free Press*, Vol. 46, No. 210 (March 13, 1920), p. 12.

39. *Manitoba Free Press*, Vol. 46, No. 213 (March 17, 1920), p. 1.

40. *Ibid.*

41. *Id.*, p. 3.

42. *Manitoba Free Press*, Vol. 50, No. 175 (January 26, 1925), p. 5.

43. *Manitoba Free Press*, Vol. 50, No. 186 (February 7, 1925), p. 3.

44. *Manitoba Free Press*, Vol. 50, No. 169 (January 19, 1925), pp. 1, 8.

45. *Manitoba Free Press*, Vol. 50, No. 206 (March 3, 1925), p. 5.

46. *Manitoba Free Press*, Vol. 54, No. 240 (April 11, 1929), p. 3.

47. *Manitoba Free Press*, Vol. 54, No. 245 (April 17, 1929), p. 1.

48. *Manitoba Free Press*, Vol. 54, No. 252 (April 25, 1929) p.3.

49. *Manitoba Free Press*, Vol. 54, No. 259 (May 3, 1929), p. 17.

50. *Id.*, p. 7.

51. *Supra*, n. 49.

52. *Manitoba Free Press*, Vol. 55, No. 205 (March 1, 1930), p. 1.

53. *Manitoba Free Press*, Vol. 56, No. 212 (March 11, 1931), p. 4;
Manitoba Free Press, Vol. 56, No. 214 (March 13, 1931), p. 4;
Manitoba Free Press, Vol. 56, No. 224 (March 25, 1931), p. 1.

54. *Winnipeg Free Press*, Vol. 61, No. 217 (March 18, 1936), p. 5.

55. *See, e.g.*: *Winnipeg Free Press*, Vol. 51, No. 159 (April 3, 1945), p. 10.

56. *Winnipeg Free Press*, Vol. 58, No. 154 (March 29, 1950), p. 8.

57. *Winnipeg Free Press*, Vol. 58, No. 155 (March 31, 1950), p. 7.

58. *Winnipeg Free Press*, Vol. 58, No. 160 (April 6, 1950), p. 4.

59. *Winnipeg Free Press*, Vol. 58, No. 171 (April 19, 1950), p. 12.

60. *Winnipeg Free Press*, Vol. 59, No. 160 (April 13, 1952), p. 13.

61. Manitoba. Royal Commission to inquire into and investigate every aspect of the Workmen's Compensation Act. *Report* of the Commissioner, the Hon. W.F.A. Turgeon, P.C. (Winnipeg: Queen's Printer, 1958), pp. 2–3.

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63. *Id.*, p. 33.

64. *Id.*, p. 32.

65. *Id.*, p. 11.

66. *Id.*, pp. 97-98.

67. *Id.*, p. 41.

68. *Ibid.*

69. *Id.*, p. 63.

70. Manitoba. *Debates and Proceedings.* Vol. 3, Nos. 22–40. July 13, 1959, p. 844.

71. *Id.*, July 10, 1959, p. 785.

72. *Supra*, n. 70.

73. Manitoba. *Debates and Proceedings.* Vol. 8, Nos. 1-25. February 28, 1963, p. 8;
Manitoba. Debates and Proceedings. Vol. 8, Nos. 51–74. April 24, 1963, p. 1593.

74. Manitoba. *Debates and Proceedings.* Vol. 9, Nos. 26–50. March 12, 1964, p. 1005.

75. Manitoba. *Debates and Proceedings.* Vol. 11, Nos. 26–50. April 5, 1965, p. 1236.

76. Manitoba. *Debates and Proceedings.* Vol. 18, Nos. 101–125. July 9, 1971, p. 2674.

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78. *Id.*, pp. 2774–2776.

79. Manitoba. *Debates and Proceedings.* Vol. 21, Nos. 106–126. May 6, 1974, p. 3138.

80. Manitoba. *Debates and Proceedings.* Vol. 21, Nos. 85–105. April 18, 1974, p. 2564.

81. Workers Compensation Procedural Review Committee, *Workers Compensation in Manitoba: Opportunities for Consolidation and Enrichment* (Winnipeg: 1980).

82. Jay Cowan, "Introduction to Report" in Manitoba. *A Report on the Workers Compensation Board of Manitoba: Compensation Challenges for the 80's* (Winnipeg: 1982), unpaginated. [the Cooper Report]

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84. *Winnipeg Free Press*, Vol. 110, No. 215 (August 13, 1982), p. 3.

CHAPTER 4

A COMPARISON OF WORKERS' COMPENSATION BENEFITS IN CANADA

I. INTRODUCTION

In Canada there are twelve jurisdictions, each with its own *Workers Compensation Act*. As a result, each jurisdiction provides differing levels of benefits, often calculated on different wage bases, as well as various services. The following information, taken from data compiled by the Associaton of Workers Compensation Boards of Canada, provides a snapshot of benefits provided in each jurisdiction as of January 1, 1986. It should be noted that compensation acts are becoming increasingly complex. The summary information provided here does not attempt to reflect that complexity, but provides a point-in-time description of some of the statistical indicators which are generally considered central to workers' compensation systems.

1) Maximum/Minimum Levels of Benefits

In all Canadian jurisdictions the workers' compensation acts contain provisions for maximum and minimum benefits available. The International Association of Industrial Accident Boards and Commissions recommends that the maximum weekly compensation rate should be at least equal to the average composite industrial wage in the jurisdiction, for the previous twelve-month period to June 30.

The following table provides the maximum and minimum weekly compensation payable in each jurisdiction. In addition, the maximum weekly compensation payable is shown as a percentage of the average composite industrial wage.

In the interest of brevity, this table simplifies some details related to the calculation of minimum compensation benefits in some jurisdictions. Readers interested in a more detailed understanding of the various provisions are referred to the regulations and statutes of the appropriate jurisdictions.

2) Income Ceilings and Wage Base

All twelve Canadian jurisdictions have ceilings on the amount of wage income to be considered in calculating compensation benefits. However, there are differences in how various jurisdictions determine the wage base to be used, e.g. gross versus net, as well as the percentage of that income base which results in the compensation amount payable.

In 1985 both Saskatchewan and Quebec began paying benefits on the basis of 90 per cent of net income, as some other jurisdictions had previously done. At present in Canada, the 12 jurisdictions are evenly split between those calculating benefits using 90 per cent of net income and those continuing to use 75 per cent of gross income.

MAXIMUM/MINIMUM COMPENSATION RATES VS. JURISDICTIONAL AVERAGE WAGE

JURISDICTION	AVERAGE INDUSTRIAL COMPOSITE WEEKLY WAGE	MAXIMUM WEEKLY COMPENSATION	MINIMUM WEEKLY COMPENSATION	MAX. WEEKLY COMPENSATION AS % OF WAGES
British Columbia	433.19	575.34	197.25*	132.81%
Alberta	441.10	509.41*	155.34†	115.49%
Saskatchewan	391.47	589.08*	196.98*	150.48%
Manitoba	382.22	447.12	159.94*	116.98%
Ontario	413.35	429.66*	215.62‡	103.95%
Quebec	403.05	428.60*	Minimum salary rate*	106.34%
New Brunswick	379.39	415.40*	50% of N.B. indust. aggregate earnings.	109.49%
Nova Scotia	367.87	403.85	120.00*	109.78%
Prince Edward Island	332.93	274.03	60.00*	82.31%
Newfoundland	393.31	533.64*	200.00†	135.68%
Northwest Territories	569.84	438.46	192.92*	76.94%
Yukon Territories	493.62	445.90	132.00*	90.33%

* or 100% of earnings if less

† or 100% of net earnings if less

‡ or net average earnings if less

The following table provides both the maximum compensable yearly salary and the wage base used for benefit calculations in each of the 12 Canadian jurisdictions.

It should be remembered that there may be differences in how each jurisdiction defines the terms "net" and "gross," i.e. what is included or deducted in order to arrive at the final income figure.

Maximum Compensable Yearly Salary vs. Wage Base for Benefit Calculation 1986

Jurisdiction	Maximum Compensable Salary/Year	Wage Base
British Columbia	$40,000.00	75% of gross income
Alberta	$40,000.00	90% of net income
Saskatchewan	$48,000.00	90% of net income
Manitoba	$31,000.00	75% of gross income
Ontario	$32,000.00	90% of net income
Quebec	$34,500.00	90% of net income
New Brunswick	$30,700.00	90% of net income
Nova Scotia	$19,000.00	75% of gross income
Prince Edward Island	$28,000.00	75% of gross income
Newfoundland	$45,500.00	90% of net income
Northwest Territories	$31,000.00	75% of gross income
Yukon	$30,400.00	75% of gross income

Some jurisdictions have within their governing legislation, provisions for periodic increases to the earnings maximum while others have various other methods for addressing this issue. Workers' compensation acts in British Columbia, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick include legislative provision for the automatic escalation of the maximum on the annual basis.

In the Yukon Territory, a section of *The Workers Compensation Act* requires that the Board determine the maximum wages to be covered effective January 1, with reference to the annual average wage of workers injured in the jurisdiction during the previous year, and rounded off to the nearest $1,000.

In the Northwest Territories the Board annually reviews benefits being paid under the earnings maximum, in order to recommend adjustments for implementation by the Legislative Assembly.

Changes to the maximum in Prince Edward Island and Nova Scotia occur with the approval of the Lieutenant Governor in Council, either following consultation with employers, or on an *ad hoc* basis by Order-In-Council.

3) Benefits for Permanent Disability (January 1, 1986)

a) British Columbia

For a permanent total disability, the maximum monthly benefit payable is $2,500, based upon 75 per cent of pre-accident average earnings. The minimum benefit equals $854.87.

In the case of a permanent partial disability, the benefit is calculated by determining a proportion of 75 per cent of earnings based on the degree of disability. The minimum amount payable is proportionate to the minimum payable for temporary total disability. Also, the British Columbia *Workers Compensation Act* allows compensation to be paid, based on a projected figure reflecting expected loss of earnings in cases where this method is deemed more equitable.

Pensions are subject to semi-annual adjustments for all injuries which occurred six months prior to the regular adjustment date. In cases where the injury, or last application for reconsideration of the level of benefits, was ten years or more previous, the Board has the power to reconsider the level of benefits. If there is evidence that the worker continues to suffer disability related to the compensable injury or condition, the Board may raise the level of benefits to the amount that an injured worker would be awarded in a similar occupation using projected loss of earnings based on current salary. This increase is made without reference to pre-accident earnings. Projected retirement income is used in cases of workers injured after age 65.

b) Alberta

In Alberta benefits for permanent total disability are based on 90 per cent of net earnings. The maximum benefit payable is $2,213.53 per month and the minimum is $675 per month.

The monthly entitlement for a permanent partial disability is based upon the Board's determination of the extent to which the worker's earning capacity has been impaired due to the compensable condition, as a proportion of 90 per cent of net earnings. The pension is payable for the worker's lifetime and is subject to legislative review on a periodic basis.

In addition to pensions for permanent partial disability, the Board may also authorize and pay supplementary benefits based on a variety of factors including ongoing wage loss, employability, etc.

Effective January 1, 1982, the Alberta Workers Compensation Board raised all pensions previously awarded, to $676.50 or by 10 per cent of the pre-1982 pension, whichever was greater. For workers injured prior to 1975 with disability pensions greater than 50 per cent, the pension plus the 1982 increase may be supplemented to age 65, in order to be equal to the pension which would have been payable if 1980 benefit levels had been in effect at the time of accident.

c) Saskatchewan

Saskatchewan provides a lump sum payment in recognition of a permanent, functional impairment. The maximum and minimum, based on a rating schedule, are $20,000 and $1,000 respectively.

The Board also provides compensation in recognition of lost wages, as estimated by the Board at 90 per cent of lost earnings. The maximum for total loss of earnings is $2,552.66, and the minimum is $853.50, or $196.98 per week. There is an exception in that for the first two years of receipt of benefits, 100 per cent of earnings may be paid if this amount is less.

Earnings loss benefits are paid to age 65, or for up to two years in cases where the injured worker was 63 years of age or over at the time of injury. Subsequently, the worker receives payment of an annuity funded by the Board at a rate of 10 per cent of all earnings loss payments made for 24 consecutive months, plus interest. *The Workers Compensation Act* also provides for a yearly increase in the pre-accident earnings based upon the increase in the Consumer Price Index for the year prior.

After 12 months of payment, Canada Pension Plan disability benefits are considered as income for the purpose of calculating earnings loss. Pre-1980 pensions are also eligible for increases in the manner described when an ongoing wage loss can be established. For pre-1980 cases, the minimum benefit for permanent total disability is $853.57 per month. The minimums for permanent partial disability are proportionate. The minimum pensions payable are not subject to offset of Canada Pension Plan disability benefits.

d) Manitoba

The maximum monthly benefit payable for permanent total disability is $1,937.50 per month and the minimum is the lesser of $693 or 100 per cent of earnings. Benefits are calculated on the basis of 75 per cent of pre-accident average earnings. For cases in which compensation was awarded prior to July 1, 1985, $693 is the minimum payable without reference to pre-accident earnings.

For permanent partial disability, the Board assesses an amount deemed to reflect the physical loss, and may pay suplementary benefits in cases in which the wage loss is proportionately greater than the physical impairment. The total of all benefits will equal no more than 75 per cent of average earnings. Minimums for permanent partial disabilities are proportionate to the minimum for permanent total disability.

Pension increases occur as a result of legislative amendments.

e) Ontario

For accidents occurring on or after April 1, 1985, which result in a permanent total disability, the Ontario system provides benefits based on 90 per cent of net average earnings, (i.e. minus Canada Pension Plan benefits, Unemployment Insurance benefits and projected income tax). Maximums vary depending upon whether or not the injured worker has dependents. For example, the maximum payable for a single worker is $1,751.87 per month, while the maximum for a worker with a spouse and one child is $1,861.85, and so on.

In the cases of permanent partial disability, the benefit provided is that proportion of 90 per cent of net average earnings which reflects the nature and degree of the physical impairment. Wage loss supplements are payable while the worker cooperates in rehabilitation and re-employment efforts. Canada Pension Plan benefits are also considered in the calculation of wage loss supplements.

Increases to pension benefits have occurred on a periodic basis as a result of legislative amendments.

f) Quebec

The Quebec system differs in many respects from the "mainstream" of workers' compensation systems in Canada. The governing legislation in this province has recently been redrafted to provide a two-step benefit system for permanent disability, which combines lump-sum payments in recognition of physical impairment with ongoing wage loss benefits. In addition, benefits paid by the workers' compensation system are now the same as those payable by Quebec's Criminal Injuries Compensation Board and the provincial auto injury insurance plan.

The new Quebec law also provides somewhat controversial features, including the provision of rehabilitation services as a "right," continuation of fringe benefits and seniority in certain circumstances, as well as right to return to work provisions.

The benefits provided under the Quebec *Act* differ so significantly in form from those provided in other provinces, that description becomes difficult. However, available information indicates that permanent impairment is addressed through a lump sum, the maximum payment of which is $50,000 for 100 per cent impairment at age 18 or under, decreasing to $25,000 for total impairment at age 65 or over. Pensions for partial impairment are determined by multiplying the percentage of impairment by the amount provided by schedule, related to the time the employment-related condition first became manifest, in relation to the worker's age at that time.

The percentage awarded the permanent physical impairment is a total of percentages determined (according to a table of bodily injuries) to reflect the physical loss of function, plus disfigurement and its psycho-social effects.

The Commission, in those cases in which the type of injury is not included in the table, establishes a percentage using the ratings for similar included injuries as a guideline.

In addition to the lump sum payment in recognition of impairment, wage loss compensation is also available based on 90 per cent of net income.

g) New Brunswick

New Brunswick currently bases benefits on 90 per cent of net average earnings. Physical impairment is recognized through payment of a lump sum. Since prior to January 1, 1982, benefits were based on 75 per cent of average pre-accident income, pensions for permanent disability for injuries occurring before that date continue to be based on three factors:

a) 75 per cent of pre-accident average wage
b) a prospective estimate of loss of earning capacity and
c) percentage of disability

Effective January 1, 1982, pensions of 50 per cent and over were increased proportionate to 75 per cent of $15,500, and pensions below 50 per cent were adjusted only in those cases where the Board recognized unusual hardship due to disability, age, employment restrictions, etc.

The minimum lump sum currently payable for permanent total impairment is $500. The maximum equals the maximum annual compensable earnings. Percentage of impairment is determined through reference to a rating schedule.

Benefits paid in New Brunswick are reduced by benefits paid under the Canada Pension Plan and Old Age Security, excepting increases in those benefits after 1984.

h) Prince Edward Island

Benefits, including pensions, are based on 75 per cent of pre-accident earnings. The 1986 maximum for total disability was $1,187.40 per month and the minimum the larger of $260 per month or 100 per cent of monthly earnings. However, the Board also has discretion to set an absolute minimum pension of $65 per month in cases in which pre-accident earnings are less than that amount.

Partial disability pensions are equal to a proportion of 75 per cent of earnings, i.e. of temporary total disability benefits based on the degree of earnings loss.

i) Nova Scotia

The maximum pension payable for total disability equals $1,750 per month, plus $143 for each child still in school. The absolute minimum payable for total disability is $530 per month. Benefits including pensions are based on 75 per cent of pre-accident earnings.

Partial disability is addressed through a monthly pension equal to a proportion of temporary total disability benefits, based on assessment of the degree of impairment.

j) Newfoundland and Labrador

Effective January 1, 1984, the province moved to a wage loss system which is based on 90 per cent of net average earnings.

Permanent disability or disfigurement is addressed through payment of a lump sum, based on a rating schedule. The minimum lump sum payable is $1,000 while the maximum is equal to the maximum compensable earnings covered by the *Act*.

Wage loss supplementation is payable to age 65, or for up to two years in the case of workers injured at age 63 or over. For all workers to whom compensation benefits are payable for over 24 consecutive months, the Board sets aside an amount equal to 10 per cent of compensation paid, plus 10 per cent of all ongoing wage loss benefits, for the purchase of an annuity for the worker at age 65.

Effective December 10, 1985, Canada Pension Plan benefits are deemed as wages, for the purpose of calculating wage loss supplementation.

k) Northwest Territories

Benefits, including pensions, are calculated on the basis of 75 per cent of pre-accident average earnings. The maximum monthly pension payable for total disability is $1,900, and the minimum is the greater of $836 or earnings.

Monthly pensions for partial disability equal a proportion of 75 per cent of average earnings, based on degree of impairment.

Pensions under 10 per cent are generally paid as a lump sum, although the Board can allow a monthly pension under certain specific criteria. However, since August 20, 1984, workers have been provided the option of a lump sum payment or a continuing monthly pension for pensions over 10 per cent.

l) Yukon Territory

i *Pre-1983 accidents*

Total disability results in a maximum monthly pension of $1,937.50, and a minimum equal to the greater of $573.57 or pre-accident earnings, based on 75 per cent of pre-accident average earnings.

Partial disability pensions are calculated as a proportion of 75 per cent of average earnings.

Since 1973 all continuing benefits, including pensions, are increased automatically, effective January 1, based on the percentage increase change in the Consumer Price Index for the year previous.

ii *For accidents after December 31, 1982*

The Yukon changed to a wage loss system, effective January 1, 1983, with regard to accidents on or after that date. Permanent impairment is compensated through payment of a lump sum with a minimum of $500 to a maximum of $25,000. The lump sum for impairment is paid without regard to wage loss.

Wage loss benefits may also be paid on an ongoing basis at 75 per cent of lost wages to the maximum noted above. Benefits are payable to age 65, beyond which time annuity benefits begin. Similar to Newfoundland, the income for purchase of the annuity reflects 10 per cent of all ongoing wage loss benefits paid for over 24 consecutive months. For injuries occurring after age 63, wage loss benefits may continue for up to two years before the change to annuity benefits. Supplementary benefits beyond age 65 may also be provided if the Board recognizes unusual hardship.

For accidents after December 31, 1983, Canada Pension Plan benefits are offset after two years' payment of compensation benefits.

Wage loss benefits are annually adjusted on the anniversary date of benefit commencement. The increase reflects the change in the Consumer Price Index for the previous year.

4) Benefits for Temporary Total Disability (January 1, 1986)

The following chart summarizes benefits available in the various jurisdictions to workers while considered disabled from employment.

5) Benefits for Temporary Partial Disability (January 1, 1986)

The methods for assessing temporary partial disability in each jurisdiction are often similar to those used in those jurisdictions to determine permanent partial disability pensions or payments. A short description of these methods is provided below.

a) British Columbia

Temporary partial disability may be paid at 75 per cent of pre- and post-accident earnings.

b) Alberta

Benefits are paid at 90 per cent of net earnings based on an estimate of the degree of impairment of earning capacity due to the compensable condition.

c) Saskatchewan

Benefits for temporary partial disability are treated in the same way as those for temporary total disability, since compensation benefits are designed to reflect loss of earnings. Calculations may also include deemed earnings, as is the case for temporary total disability benefits.

d) Manitoba

Benefits may be based on impaired earning capacity, estimated from the degree of disability or on the basis of 75 per cent of the difference between pre- and post-accident earnings.

We are unaware of any temporary partial disability benefits being assessed and paid within recent years in this province.

e) Ontario

Workers receive full benefits when suitable work is unavailable and they are involved in a vocational rehabilitation program. However, the *Act* also allows for payment of a portion of temporary total disability benefits which reflects the impairment of earning capacity.

f) Quebec

Benefits are calculated as a proportion of weighted net income, based on the assessed degree of impairment.

g) New Brunswick

Benefits are available at the level of 90 per cent of the estimated loss of earnings.

h) Nova Scotia

Benefits payable at 75 per cent of the difference between pre-and post-accident earnings.

i) Prince Edward Island

Benefits may be based either on the degree of impairment or 75 per cent of the difference between pre- and post-accident earnings.

j) Newfoundland/Labrador

Benefits are based on 90 per cent of the estimated loss of earnings.

k) Northwest Territories

Compensation is based on the percentage degree of disability.

l) Yukon Territory

Benefits equal a proportion of temporary total disability benefits, based on the degree of impairment.

WEEKLY BENEFITS FOR TEMPORARY DISABILITY January 1, 1986

Jurisdiction	Earnings Base	Maximum	Minimum	Escalation Provision
British Columbia	75% of average earnings	$575.34	$197.25*	Semi-annual (after 6 mos. C.P.I.)
Alberta	90% of net earnings	509.41	155.34*	Legislated
Saskatchewan	90% of net earnings loss	589.01 (1	196.98 *(2	Annual
Manitoba	75% of average earnings	447.12	159.94*	No
Ontario	90% of net average earnings	404.28† 429.66†	215.62*	Legislated
Quebec	90% of weighted net income	394.91† 428.60†	minimum wage*	Not known
New Brunswick	90% of net income	382.68† 415.40†	see below**	Wage loss benefits updated yearly
Prince Edward Island	75% of average earnings	274.03	60.00*	No
Nova Scotia	75% of average earnings	403.85	120.00*	No
Newfoundland/ Labrador	90% of weighted net earnings	523.13† 533.64†	200.00*	Legislated
Northwest Territories	75% of average earnings	438.46	192.92*	Annual - W.C.B recommendation
Yukon Territories	75% of average earnings	445.90	132.00*	Annual

1) Worker with 2 dependents

2) Absolute minimum $196.98 after 2 years

** 50% of N.B. industrial aggregate wage payable 2 years from accident date.

* Or 100% of earnings if less

† Payment varies according to dependents. 1st figure for single worker 2nd figure for 2 dependents.

6) Survivor Dependency Benefits (as of January 1, 1986)

a) British Columbia

For cases during the period July 1, 1974 to April 16, 1985, the following benefits were paid (subject to increase every January 1 and July 1):

i) Funeral allowance $1,878.11

ii) Transportation $ 526.04

iii) Incidental expenses $ 526.04

iv) Lump sum to widow $1,315.17

v) The equivalent to benefits for permanent total disability, minus Canada Pension Plan benefits, to a dependent widow with two children. The minimum average earning used to determine the payment figure is $18,411.71. The term widow is understood to include a common-law wife or invalid spouse.

vi) For a dependent widow with one child: 85 per cent of permanent total disability benefits, minus Canada Pension Plan benefits payable.

vii) Beyond two children: $170.92 per month for each additional child.

viii) For a dependent widow aged 50 years or over, or an invalid spouse: 60 per cent of permanent total disability benefits, minus Canada Pension Plan benefits, payable with a minimum amount per month of $552.28.

ix) For a dependent widow under age 40 with no dependent children, or for a non-invalid widower of any age: a lump sum of $26,302.39. This lump sum payment is not available to invalid widows or spouses.

x) For a dependent widow between the ages of 40 and 50 years with no dependent children: a monthly pension of $552.28 plus 1/11 of the difference between $552.08 and the amount which would have been payable under item viii above for each year between the ages of 40 and 49.

xi) On remarriage: a lump sum equivalent to two years' pension. Total benefits to widows will not be less, however, than $26,302.39 plus the widow's lump sum of $1,315.17 and the funeral expenses earlier detailed.

xii) For one dependent child in a single parent family resulting in no widow: 40 per cent of the permanent total disability benefit minus Canada Pension Plan benefits payable.

xiii) For two children, no widow: 50 per cent of the permanent total disability benefit minus Canada Pension Plan benefits payable.

xiv) For three or more children, no widow: 60 per cent of the permanent total disability benefit plus $170.92 per month for each additional child over three in number.

xv) For all other dependents: up to $300.16 per month, based upon financial loss.

Note: For all of the above, the term child is understood to mean a person under 18 years of age, a person under age 21 regularly attending an educational institution, or an invalid child.

In 1985 British Columbia changed its regulations related to dependency survivor benefits. The amounts remain the same, but for all cases on or after April 17, 1985, widowers receive the same benefits as widows, and common-law husbands as common-law wives.

b) Alberta

The information provided, relates to accidents on or after January 1, 1982. In general, benefits payable to a dependent spouse, with or without children, are equal to those which would have been paid to the worker in the case of permanent total disability. Benefits are payable for five years or until the spouse becomes gainfully employed, whichever occurs sooner. Rehabilitation services are available to assist the spouse in preparing for employment. However, if the spouse refuses rehabilitation services or is noncooperative, the five-year entitlement may be cancelled. For an invalid spouse who is not employable, the full pension may be continued at the discretion of the Workers Compensation Board.

After five years, the spouse is eligible for a gradually reducing pension, payable for another five years (100 per cent for year one, 80 per cent for year two, and so on).

If the spouse is employed or is deemed by the Board capable of employment at the time of the worker's death, s/he is paid the gradually decreasing pension described above. If the spouse is considered to be underemployed, the Board may deduct up to the amount of wages earned from the initial five-year pension amount until the spouse is gainfully employed.

For a surviving spouse with children, the pension continues until the youngest child reaches age 18.

At that time, if the spouse is not employed, the five-year pension may be continued, followed by the decreasing pension, depending upon employment status.

For an invalid spouse, or one deemed to be unemployable, the Board retains the discretion to determine the level of benefits to be paid.

In the case of dependent children where there is no spouse, a guardian may be paid the same benefits as would a spouse until the eighteenth birthday of the youngest child. Subsequently, the reducing pension would be payable, divided among the surviving children. Should more than one guardian be appointed, the pension could be divided between them.

Should there be dependent children of the deceased worker not living with the surviving spouse at the time of death, they receive up to $139 per month each, without reference to benefits received by the surviving spouse. Where there is no surviving spouse, or should s/he die or become institutionalized subsequent to the death of the injured worker, the Board may make additional payments of up to $66 for each child.

The Board may also authorize additional amounts deemed necessary to dependents (spouse or children), due to financial hardship resulting from illness.

In the case of other dependents where there is no spouse or children, benefits may be paid to a maximum of $2,213.53 per month, as deemed appropriate by the Board.

In Alberta, benefits to surviving spouses remain unchanged upon remarriage. The Board also includes common-law partners under the definition of spouse, within specified time frames.

c) Saskatchewan

The information provided, relates to fatalities occurring on or after January 1, 1980.

A dependent spouse without children receives the equivalent to benefits for permanent total disability, payable for no less than five years or longer if, in the opinion of the Board, termination might result in financial hardship. Rehabilitation services are available to the surviving spouse.

Dependent spouses with children are eligible for the same level of benefits which, however, continue for the greater of five years or until the youngest child reaches age 16, or until any child in secondary or post-secondary education reaches age 18. However, dependent children aged 18, attending a secondary or post-secondary educational institution full time on or after January 1, 1985, are eligible for a monthly allowance of $175. This allowance continues to age 21. Also, each dependent child, aged 18 in full-time attendence at a post-secondary educational institution, is eligible for an amount equal to the total cost of tuition, books and applicable fees, which may be paid to age 21.

Benefits provided to other dependents may be determined by the Board, based upon an assessment of financial loss.

All benefits paid beyond 12 months from the date of death include an offset of survivor's benefits paid under the Canada Pension Plan, except where benefits are paid at the minimum level.

As with other benefits, the above-noted benefits are increased annually with reference to the Consumer Price Index.

d) Manitoba

For fatalities occurring after December 31, 1973, benefits to the surviving spouse are equal to the larger of the amount which would have been paid, had the worker been totally disabled on a permanent basis or as provided under section 25 of the current *Workers Compensation Act*.

Section 25 of the *Act* outlines the benefits available under a variety of circumstances. Unfortunately, this section references so many circumstances that summary becomes impossible. Therefore, the following information is provided, which is taken directly from the Lay Version of the Manitoba *Workers Compensation Act* used by Board staff:

Death before 1974

25(1) In respect only of a worker who died prior to January 1, 1974, compensation payable to his dependents is as follows:

25(1)

	Relationship of dependents to worker.	Benefits payable
(a)	a widow or an invalid widower who is the worker's sole dependent.	an amount of up to $590.00 per month for life.
(b)	a widow or invalid widower and a child or children under sixteen years of age*	for the widow or invalid widower, $590.00 per month for life, plus $133.00 per month per child.

(cont'd) Death before 1974

25(1)

	Relationship of dependents to worker.	Benefits payable
(c)	orphaned children under sixteen years of age*	$148.00 per month per child.

*benefits cease when the child reaches the age of sixteen, unless the child continues studies or training and qualifies for continued benefits under 25(1)(e). In that case, benefits cease in accordance with 25(1)(e).

See also "Duration of payments to children"	25(3)
and "Compensation for invalid child"	25(4)

(d)	a wholly dependent mother of the worker	as determined by the board, an amount of up to $590.00 per month, for life.
(e)	children aged sixteen or older whose course of academic study or technical or vocational training has been approved by the board.*	
	If the child is an orphan	$163.00 per month.
	If the child is not an orphan	$148.00 per month.

*Benefits will cease when, in the board's opinion, the child is no longer attempting to obtain further education or training, or when the child is first granted a degree, diploma, or certificate of course completion.

See also "Duration of payments to children"	25(3)
and "Compensation for invalid child"	25(4)

(f)	dependents other than those mentioned in 25(1)(a) to 25(1)(e)	
	In respect of all of these dependents	an aggregate of$238.00 in any month.
	In respect of any one dependent	as determined by the board, an amount of up to $119.00 per month.

Maximum and minimum payments.

25(2) Compensation provided for dependents under 25(1) is subject to a maximum benefit limit, set at 75% of the average monthly earnings of that worker.

However, application of this limit is subject to the following minimum benefit provisions:

(a) where a widow or invalid widower is the worker's sole dependent:

The maximum benefit limit does not apply to the widow or invalid widower's benefit in section 25(1)(a). The benefit payment remains at $590.00 per month for life.

(b) where there is a widow or invalid widower and one child:

If 75% of the worker's average monthly earnings (the maximum benefit) is less than the minimum benefit, which is the amount obtained by adding

the widow or invalid widower's benefit.	$590.00	25(1)(a)
to		
the child's benefit.	$133.00	25(1)(b)
or	$148.00	25(1)(e)

then the actual dependent benefit is not affected by the maximum benefit limit: the benefit remains equal to the amount obtained by adding the widow or invalid widower's benefit to the child's benefit.

(c) where there is a widow or invalid widower and two or more children:

the widow or invalid widower's benefit.	$590.00	25(1)(a)
to		
the two oldest children's* benefits	$133.00 times 2	25(1)(b)
or	$148.00 times 2	25(1)(e)
or	$133.00	
plus	$148.00	(b)&(e)

*Children in respect of whom benefits are payable under section 25(1).

then the actual dependent benefit payable is an amount which is equivalent to the minimum benefit for a widow or invalid widower and two or more children (obtained by adding the widow or invalid widower's benefit to the two oldest children's benefits.)

Duration of payments to children.

25(3) Payments under 25(1)(b) and 25(1)(c) cease when the dependent child reaches the age of 16 or if the child dies. If the child is an invalid, the payments will continue until the child ceases to be an invalid.

As well, benefits may continue beyond age sixteen for children taking courses 25(1)(e)

Compensation for invalid child.

25(4) For any invalid child of 16 years of age or older, benefits are payable in the same amounts as for children under 16 years of age.

Payments will cease when the child ceases to be an invalid, or if the child dies.

However, if the child ceased to be an invalid and was taking courses, the child may qualify for continued benefits. See 25(1)(e)

Duration of payments to dependents other than widow or children.

25(5) Payments to dependents under sections 25(1)(d) and 25(1)(f) will continue only so long as it might reasonably be expected that the worker would have contributed to their support. This payment will be determined by the board.

Delay of assessment for compensation under 25(1)(e).

25(6) Levies, assessments and deposit orders related to compensation payable under 25(1)(e) will not be made by the board until the child in question approaches the age of 16 and the board has resolved to provide for further education or training.

Where deceased worker survived by spouse.

25.1(1) In respect only of a worker who dies after June 30, 1976, compensation payable to a surviving spouse will be the greater of

(a) a monthly benefit equivalent to permanent-total disability benefits calculated under the Act;

and

(b) a monthly benefit calculated according to the provisions in section 25 [25(1) to 25(6)].

If the worker is not survived by a spouse, the dependent benefits payable are those established in section 25. See "Where no surviving spouse" 25.1(2)

Where no surviving spouse.

25.1(2) In respect of a worker who dies after December 31, 1973 and who is not survived by dependent spouse, benefits are to be calculated as provided under section 25. [25(1) to 25(6)].

Death between 1973 and 1976

25.1(3) In respect only of a worker who died after December 31, 1973 but before July 1, 1976, the compensation payable to a surviving dependent widow or invalid widower will be the greater of

(a) a monthly benefit equal to the permanent total disability benefits calculated under the Act;

and

(b) a monthly benefit calculated according to the provisions in section 25.

Note: While this section 25.1(3) and section 25.1(2) are almost identically worded, the benefits provided under each section differ. The definitions section was amended in 1976, and has a broader scope than it did between 1973 and 1976. As well, benefit amounts have themselves undergone statutory increases.

Compensation for funeral expenses, etc.

25.2(1) In addition to any other compensation granted under the Act in respect of an accident, certain funeral-related expenses are covered in the event of a worker's death. The board will pay

(a) up to $1500.00 to cover actual funeral and burial services.

(b) transportation expenses necessarily incurred in transporting the worker's body from the place where he is killed, if it is in Manitoba, to his usual residence, if it is also in Manitoba;

(c) at its discretion, a portion of the expenses necessarily incurred in transporting the worker's body to his usual residence, in cases where the worker

(Cont'd) Compesation for funeral expenses, etc.

25.2(1)

(i) is killed in Manitoba and his usual residence is outside the province; or

(ii) is killed outside the province, and his usual residence is within Manitoba.

Payment of expenses.

25.2(2) When a worker dies from an accident and he does not have any dependents, the board will pay an amount* which it considers reasonable towards expenses for that worker's medical attendance, nursing care, maintenance, funeral, and burial.

The proper recipient of funds will be determined by the board.

*Payments are subject to the usual limitations imposed by the Act for similar expenses.

Payments to foster parent.

25.3 When a worker dies as the result of an accident, and the worker did not have a spouse, or the spouse died after benefit payments commenced, the board may recognize as a foster parent some suitable person who keeps the worker's household together.

This person will then receive a monthly benefit equal to that which would be payable in respect of all the worker's dependents. The compensation paid to the foster parent is in lieu of the monthly benefits dependents would otherwise have been entitled to receive.

Payment to spouse or estate.

25.4 In the event of a worker's death from an accident, a lump sum benefit is payable over and above the monthly benefit for dependents.

A sum of $1,305.00 is payable to the worker's spouse, or if there is no spouse, to the worker's estate, or to some person that the board considers to be a proper recipient.

Compensation to common-law spouse.

25.5 In the event of a worker's death from an accident, benefits are payable to a common-law spouse if

(a) that spouse qualifies under the definition for a common-law spouse in 2(1)(e);

(b) the common-law relationship has existed for three entire years immediately preceding death; and

(c) the worker is not also survived by a dependent legal spouse.

Benefit payments will cease when the common-law spouse marries or enters some other common-law relationship.

Cessation of payment to one of several dependents.

26 When a payment to any one of a number of dependents ceases, the board may adjust compensation for the remaining dependents to amounts that would be payable had they been the only dependents when the worker died.

Marriage of surviving spouse.

27(1) If a worker's surviving spouse remarries, benefits for the spouse will cease and he will receive a final benefit payment of $3,600.00.

Compensation for dependent children.

27(2) Even though the surviving spouse's benefits may cease under 27(1), the spouse will continue to receive compensation in respect of the worker's dependent children.

Provisions for calculating the children's benefits are set out in 25(1)(b), 25(1)(e), 25(3), and 25(4).

Death of surviving spouse.

27(3) While benefits provided for a spouse in sections 25 or 25(1) will cease when the spouse dies, benefits for other dependents will be continued. The continued benefits will be calculated as provided under section 25 [25(1) to 25(6)].

Where surviving spouse not maintaining other dependents.

27(4) When a worker's surviving spouse does not provide for the worker's dependents in a way which the board finds satisfactory, the board will deduct the dependents' benefits from the spouse's compensation. The money deducted will tnen be paid in some other manner, or to a person that the board considers suitable, in order to promote the welfare of those dependents.

Diverting payments for dependent children.

27(5) If for any reason the board sees fit not to make a dependent child's benefit payable directly to that child's parent, it may make the payment to another person, or it may have the funds applied in some other manner, in order to promote the child's welfare.

Proof of condition of dependents.

28 From time to time, the board may require proof that dependents exist, or proof of their necessities or condition. Until these proofs are received by the board, benefit payments may be withheld.

e) Ontario

For deaths after April 1, 1985, the surviving spouse receives a lump sum of $40,680 base figure, increased by $1,017 for every year under 40 years of age, or decreased by that amount for each year over that age. On this basis, the minimum lump sum payable is $20,340 and the maximum is $61,020.

Monthly pensions are also payable as follows:

a) For a surviving spouse with no children: 40 per cent of net average earnings plus 1 per cent of that figure for every year over age 40, and minus that amount for every year under age 40. Therefore, the range of the pension falls between 20 to 60 per cent of net earnings.

b) A surviving spouse with one or more children, receives 90 per cent of net average earnings at the time of the worker's death, payable until the youngest child reaches age 19. Subsequently, the spouse receives a lifetime pension based on age. If the Board determines it is advisable for the child over age 19 to continue his/her education, a monthly pension equal to 10 per cent of the net average earnings of the worker is paid. However, the combined benefits to spouse and children cannot exceed 90 per cent of the deceased worker's net average earnings.

c) Dependent children, where there is no surviving spouse, receive benefits as follows:

  i) one child: 30 per cent of net average earnings.

  ii) Two or more children: 30 per cent of net average earnings, plus 10 per cent for each additional child to an aggregate maximum of 90 per cent of net average earnings.

  iii) $40,680 lump sum payment to dependent children as a group.

d) Other dependents may receive, where there is no dependent spouse or children, benefits based on loss of income to a maximum of 50 per cent of net average earnings.

Pension calculations include an offset of Canada Pension Plan dependency benefits.

There is no age limit to payment of pension to invalid children.

f) Quebec

Fatality and dependency benefits available under Quebec legislation are as follows:

i) For the spouse of a deceased worker: a lump sum amount—maximum $130,000, minimum $52,000—depending upon the age of the spouse, plus a pension equal to 55 per cent to 90 per cent of net weighted income of the deceased worker. The period of entitlement is outlined in the legislation.

ii) For a child under the age of majority: $260 per month until an adult.

iii) For a child over the age of majority: a lump sum of $9,300, if engaged in full-time academic studies at the time of the death.

iv) For an invalid child: a lump sum of $52,000 or to $9,360 if receiving benefits from other sources.

v) For dependents other than a spouse and children:

  a) If under age 35 and receiving provision of needs from the deceased worker in excess of 50 per cent: i.e. a lump sum of $6,240.

  b) If over age 35 with needs provided at 75 per cent of gross annual income: a lump sum of $25,875.

  c) If invalid, a lump sum of $52,000, or up to $9,360 if receiving benefits from other sources.

vi) For any other person whose needs were provided for by the deceased worker:

  a) A lump sum of $6,240 if needs provided at 25 to 50 per cent.

  b) A lump sum of $3,120 if needs provided at 10 to 25 per cent.

vii) For the father and mother of a deceased worker without dependents: $3,120 lump sum payment to each parent. Should one birth parent be deceased or no longer have parental authority (through divorce, etc.), that share is provided to the other parent.

g) New Brunswick

For injuries occurring after January 1, 1982, the following benefits are provided:

i) For a non-employed dependent spouse with or without children: 80 per cent of the net earnings of the deceased worker, minus any Canada Pension Plan benefits to which the spouse is entitled, to a maximum of $19,200.78 or $1,600.07 per month. The maximum derives from 150 per cent of the industrial aggregate earnings for that year.

ii) For an employed dependent spouse: 80 per cent of net earnings minus the amount of net family income over 90 per cent of the pre-accident net family income. Benefits are also offset by Canada Pension Plan benefits payable.

iii) In the event of remarriage of a surviving spouse, including common-law partners, the spouse is eligible for a lump sum payment equal to one year's benefits. Flat rate benefits to children then become payable.

iv) To dependent children up to and including the age of 17, monthly benefits based on the aggregate industrial wage paid to the surviving spouse as follows:

    a) Ages 0 to 6 years: 10 per cent ($170.53 monthly).

    b) Ages 7 to 13 years: 12.5 per cent ($213.13 monthly).

    c) Ages 14 to 17 years: 15 per cent ($255.80 monthly).

    d) Invalid children, regardless of age: as per c) above.

v) To children aged 18 to 22 continuing in education: as per children aged 14 to 17, plus any other supplementary benefits which might be provided by the Board.

vi) Where there is no surviving spouse, or the surviving spouse dies, benefits are paid to the guardian.

vii) To dependents other than spouse or children: as determined by the Board, based on pecuniary loss.

Aggregate benefits are limited to 90 per cent of the net income of the deceased worker.

At age 65, spousal benefits change to annuity income. The annuity is based upon 8 per cent of all benefits paid to date. Canada Pension Plan offset does not apply.

h) Prince Edward Island

Benefits available as follows:

i) Sole dependent spouse: $450 per month.

ii) Children to age 18 or continuing education to age 21: $100 per month.

iii) Orphans, as above: $115 per month.

iv) Other dependents: $60 monthly for one person, $80 per month maximum.

There is no aggregate limit on survivor benefits in Prince Edward Island.

i) Nova Scotia

Effective January 1, 1986, for all cases, benefits provided are as follows:

i) Sole dependent spouse: $509 per month.

ii) Children and orphans to age 18, or age 21 for continuing education: $149 per month per child.

iii) For other dependents: $182 per month for one. Maximum benefit available, $238 per month.

j) Newfoundland and Labrador

For accidents on or after January 1, 1984, benefits are calculated on 90 per cent of the deceased worker's net income.

The minimum lump sum provided is based on the worker's net earnings. The maximum with two dependents is $69,373. The maximum with 12 dependents is $76,429. The minimum is based on the minimum paid for permanent total disability, this being $26,000.

The maximum total pension payable to multiple dependents is $1,910.74 per month.

For children continuing in education, benefits are payable to age 25.

k) Northwest Territories

For all accidents on or after July 1, 1985, benefits are as follows:

i) Sole dependent spouse: $836 per month.

ii) For children to age 16 or first degree: $190 per month.

iii) For orphan children, or where the surviving spouse is institutionalized: an amount not exceeding, in aggregate for all children, that payable to a dependent spouse plus the basic children's benefit; no age limit.

iv) Other dependents: as per the monetary loss to a maximum of $836 per month.

l) Yukon Territory

Benefits are provided as follows:

- i) Sole dependent spouse: $747 per month.
- ii) Invalid children: $213 per month: no age limit.
- iii) Dependent children to age 16 or continuing to age 18 for ongoing education: $190 per month.
- iv) Orphans: an additional discretionary allowance of $25 per month.
- v) Discretionary allowances for illness of spouse or child: up to $45 per month.
- vi) Other dependents: as determined by the Board on the basis of monetary loss.

All benefits are increased annually with reference to changes in the Consumer Price Index.

SPECIAL ALLOWANCES FOR HANDICAPPED

JURISDICTION	PERSONAL CARE, ATTENDANCE OR HELPLESSNESS ALLOWANCES IN PERMANENT TOTAL DIABILITY CASES	CLOTHING ALLOWANCES FOR WEAR AND TEAR DUE TO ARTIFICIAL APPLIANCES IN PERMANENT DISABILITY CASES
British Columbia	From $262.56 to $1,050.21 per month. 5 categories.	Upper limb $160.64 per annum. Lower limb or leg brace $321.30 per annum. (No longer necessarily done annually.)
Alberta	From $378.00 to $1,329.00 monthly. Based on AHSC rates for nursing home care. Additional independence allowance of $125 per month available.	$200 per annum.
Saskatchewan	From $213 to $1,075 per month. 4 categories. Annual CPI adj. Effective Jan. 1/85, Additional independence allowance up to 10% of max. lump sum in effect.	Upper limb $142 per annum, $11.83 per month. Lower limb $316 per annum, $26.34 per month.
Manitoba	From $140 minimum to $980 maximum per month.	Upper limb $166 per annum. Lower limb $333 per annum. If due to orthotic devices $333 per annum.
Ontario	From $156.09 to $1,098.79 per month. 7 catagories.	Upper limb $187.13 per annum. Lower limb, permanent leg brace or back brace for permanent back disability $374.26 per yr.
Quebec	From $208 to $832 per month depending on severity.	Maximum $300 per annum by regulation.
New Brunswick	From $90 to $300 per month. 5 categories.	Maximum of $150 per annum.
Prince Edward Island	No fixed amounts.	Not applicable.
Nova Scotia	$300 per month maximum allowance. Board may provide necessary treatment service/ attendance.	Maximum $350 per annum.
Newfoundland and Labrador	From $100 to $500 per month. 7 levels.	Provided for. No maximum stipulated in Act.
Northwest Territories	Board pays for necessary care. No set figures but would not exceed nursing home care allowance.	Maximum $100 per annum.
Yukon Territory	Five categories, from $7 to $24 per day. Independence allowance of $132 per annum.	Upper prosthesis $132 per annum maximum. Lower prosthesis $268 per annum maximum.

FATAL BENEFITS OTHER THAN PENSIONS

JURISDICTION	IMMEDIATE LUMP SUM	FUNERAL COST	TRANSPORTATION BODY	LUMP SUM PAYABLE ON REMARRIAGE
British Columbia	$1,315.17	$1,578.11 plus $526.04 for incidentals.	$526.04	2 years pension. Total spouse's benefit not less than $26,302.39
Alberta	$1,100	$1,350	$450 maximum	For post 1981 cases, pension continues.
Saskatchewan	$3,000	Included in lump sum.	Actual costs in Canada.	Benefits continue irrespective of remarriage for a min. of 5 years for accidents occurring on & after September 1, 1985.
Manitoba	$1,305	$1,500 maximum	Necessary costs	$3,600
Ontario	$20,340 to $61,020. See page 19	$1,525.50 minimum	Necessary costs	Pension continues after remarriage.
Quebec	$1,040	$1,560	Prescribed by regulations. Cost.	Not applicable.
New Brunswick	Nil	5% of N.B. Ind. Aggr. Earnings. No offset. 1986—$1,023	Necessary expenses within Canada	One year's spouse's pension in a lump sum.
Prince Edward Island	$500	$900 maximum.	$300 maximum	12 x $450 = $5,400
Nova Scotia	$1,000	$750 maximum.	$300 maximum.	$2,912.00
Newfoundland and Labrador	$26,000 to $76,429. See page 22.	$1,120 maximum	Necessary costs	The lesser of $5,000 and athe aggregate benefits otherwise payable to the spouse for 1 year from date of marriage.
Northwest Territories	4% of YMAR * $1,216	4% of YMAR * $1,216	Necessary costs withing NWT.	$10,032.00
Yukon Territory	$1,402	$1,605	$283 maximum	$7,019

*Year's Maximum Assessable Remuneration

CHAPTER 5

PUBLIC HEARINGS

I. INJURED WORKERS

During the course of the extensive public hearings, the Committee heard presentations from 257 injured workers. The number of injured workers who came forward exceeded the Committee's expectations.

In reviewing the material presented by injured workers, the Committee is aware that the complaints and concerns heard represent only a very small number of the claims which have been processed through the system. The members are also aware that they heard only negative and not positive responses to the system. For example, no Committee member was surprised that those injured workers appealing Compensation Board decisions, who appeared at public hearings, were not, by and large, complimentary toward the organization.

However, the Legislative Review Committee was charged with the responsibility of identifying the inadequacies of the current workers' compensation system in Manitoba, in order to recommend improvements. By necessity, such an inquiry tends to concentrate on complaints over compliments, and criticism over praise.

As expected, many of the concerns raised by injured workers were case-specific, related to the individual and unique circumstances surrounding their injury claims. However, certain issues were raised with such regularity and consistency that they clearly indicate systemic problems rather than occasional lapses. We have given particular attention to those issues which were not only consistently brought forward by claimants of workers' compensation benefits, but which were echoed by labour organizations, employers or other individuals and organizations involved with the system.

It would be unjust to the numerous injured workers who made presentations to this Committee to suggest that their many insights and recommendations can be distilled into a few short paragraphs. However, the overview which follows summarizes some of the major concerns expressed by injured workers.

1) Northern Issues

A major theme from injured workers in northern Manitoba, subsuming a number of others, was that injured workers in rural areas receive from the Workers Compensation Board, service less adequate than that received in the city. Services centralized in Winnipeg were characterized by delays and miscommunication. Northern workers appeared to feel that their needs would be better served through the establishment of a local Workers Compensation Board office having the necessary personnel and authority to adjudicate claims, produce benefit cheques and provide vocational rehabilitation services.

Considerable criticism was directed at a policy of the Workers Compensation Board, requiring relocation of injured workers to urban areas if, while in receipt of benefits through the Rehabilitation Department for job search purposes, job opportunities were deemed by the Workers Compensation Board to be inadequate or to have been exhausted. A number of social and personal costs were cited, related to these relocations required by the Workers Compensation Board. The question was also raised as to whether it was reasonable in the long-term, to relocate northern workers to Winnipeg where some unemployment already exists.

It should be noted that although the issue of rural isolation has been addressed in relation to northern Manitoba, numerous other injured workers from rural areas also noted similar disparities in service, resulting from what has been called "perimeter highway syndrome." That phrase may be understood as describing not only the concentration of service and personnel in Winnipeg, but also a perceived lack of understanding by the Workers Compensation Board of the reasons that people choose to live in rural areas, and would choose to remain there.

2) Adjudication

Injured workers at public hearings, urban and rural, had a range of concerns related to the initial adjudication of claims, as well as the subsequent, ongoing adjudicative decisions which might be made. The primary concern, without question, related to delays within the Workers Compensation Board—delays in initial adjudication, production of initial benefit cheques, receipt of ongoing benefits, decisions affecting vocational rehabilitation planning, etc., etc., etc. Certainly from the point of view of many injured workers, the Manitoba workers' compensation system does not appear to operate smoothly, i.e. in a coordinated and sensitive way. Injured workers expressed their frustration at the amount of time it takes for the Workers Compensation Board to **do** things; i.e. to make decisions, to provide an initial benefit cheque after a compensable injury has been reported, etc.

For example, the Committee heard from an injured worker who had filed a claim on October 1, 1985. At the time he appeared at public hearings in April of 1986, he had been waiting approximately 6 1/2 months for a decision to be made regarding his claim. The delay appeared to relate to the fact that the accident employer was disputing the incident. However, whatever the circumstances, more than six months seems a long time for an adjudication decision.

The Committee also heard from injured workers who had waited up to three months for an initial benefit cheque. The complaints about delays in initial cheques were to some extent supported by information subsequently obtained by the Committee regarding the period of time required to produce initial cheques from the date the claim was made. This information is contained in Chapter 6.

Of course, it is to be expected that there would be dissatisfaction with some of the adjudicative decisions which were made. The major complaint heard by the Committee was from injured workers who contended that they were released fit to return to regular employment duties—with workers' compensation benefits being terminated—before they were, in fact, able to do so. A number of them indicated that this decision had been made by the Workers Compensation Board against the advice of their personal physicians. (This latter issue will be more fully addressed in a subsequent section of this report.)

However, the major delays cited related to appeals of adjudication decisions. For example, an injured worker appealed a Compensation Board decision to discharge him fit to return to pre-accident duties after approximately 14 months of temporary total disability benefits. He appeared at public hearings during the third week of April 1986. At that time he informed the Committee that he had not yet had a decision in response to a letter of appeal, mailed on December 28, 1985.

The cases cited here are not isolated ones. The Committee heard from injured workers whose appeals took up to 21 months to proceed through all three levels of appeal.

3) Benefits

Approximately 30 presenters suggested to the Committee that significant financial hardship can result from the lack, in current legislation, of any allowance for automatic cost of living increases to workers' compensation benefits, including temporary total disability benefits and wage loss benefits. Permanent partial disability awards are increased periodically by the Legislature.

Although current procedure dictates that benefits for temporary total disability will be increased upon notification by the employer of a wage increase for pre-accident duties, several injured workers presenting to the Committee suggested that this information was not always forthcoming, and that the Workers Compensation Board's system was inconsistent in requesting it. In addition, benefits remain subject to the maximum benefit payable for the accident year. In other words, no matter how long a worker may be in receipt of temporary total disability benefits, s/he cannot receive more than the maximum which was payable in the year of his/her injury.

As would be expected, not all presenters were fully conversant with the policies and procedures related to the establishment of benefit levels and of the calculation of allowable increases. However, a clear request was presented to the Committee, for a system which would provide regular cost-of-living adjustments for all long-term workers' compensation recipients.

4) Medical

It was clear to the Committee, from the public hearings, that a major concern of injured workers is the role played by Workers Compensation Board Medical Officers in the adjudication process.

The single most common complaint raised by injured workers during public hearings was about the overruling of their personal physicians' opinions by Workers Compensation Board Medical Officers. Numerous presenters questioned the authority of the Medical Officers to ignore or contradict the medical opinions of community physicians. Several, who were relatively well-informed regarding Workers Compensation Board policy and the governing legislation, suggested that in such situations a medical review panel should be convened. However, several current and past recipients of benefits indicated that their requests for medical review panels were refused by the Workers Compensation Board, even where there was a clear difference of medical opinion. If this is the case, it is a violation of section 54.1(4) of *The Workers Compensation Act.*

5) Assessment of Physical Impairment

The current method used by the Manitoba Workers Compensation Board for rating the extent of physical impairment resulting from a compensable injury is not very popular with the injured workers of this province. The current system of awarding permanent partial disability awards received considerable criticism.

The Committee is aware that the issue of "disability pensions" is one being faced by most if not all Workers Compensation Boards which are struggling to establish ways of addressing both impairment (the "mechanical" dysfunction resulting from an injury or illness) and disability (the financial loss and social consequences of the injury or illness). It is possible that some of the frustration expressed by the injured workers who appeared before the Committee, results in part from their confusion regarding impairment and disability, and from a lack of understanding of the "wage-loss" supplementation system used by the Manitoba Workers Compensation Board to address loss of earnings following a compensable injury. However, the fact remains that many injured workers who approached the Committee felt that ratings of impairment (permanent partial disability) were inconsistent and did not reflect the degree of impairment actually resulting from the compensable condition.

The Committee heard that the impairment rating system in Manitoba is particularly inadequate for assessing impairment related to back conditions. It was suggested that although the degree of impairment resulting from a back condition might be greater than that from the amputation of a finger on the non-dominant hand (due to the intense pain often associated with back injury), most back conditions are considered "non-rateable" by the Workers Compensation Board, unless accompanied by a measurable decrease in the range of motion of the back, not caused solely by pain. The lack of recognition of pain as a disabling factor in permanent partial disability rating was criticized by numerous injured workers. Some suggested that by barring consideration of pain from impairment assessments, the system insures that the more seriously disabled worker is the least well-compensated, and suffers the greatest financial and social hardship.

6) Pre-existing Conditions

The concept of the pre-existing condition illustrates most clearly some of the medical, philosophical and adjudicative complexities associated with workers' compensation in this province and elsewhere. How can the physician distinguish the direct effects of the compensable injury or illness from those associated with conditions predating the injury? Should employers be responsible for compensation benefits to workers losing time, even though they were predisposed to injury or illness due to a pre-existing physical condition? How is compensability adjudicated in the presence of a pre-existing medical condition?

The complaint presented by a majority of the injured workers who commented on the subject at public hearings was very simple: that despite pre-existing medical conditions (many of which were diagnosed for the first time after the compensable incidents), the workers were able to do their jobs prior to their injuries or illnesses but were unable to do them afterward. Therefore, they felt that the ongoing impairment and disability resulting from the compensable incident should be compensated, pre-existing conditions notwithstanding. However, in these cases the Workers Compensation Board had terminated benefits with the explanation that ongoing symptomatology was related to the pre-existing condition and that, therefore, continuing time loss was not compensable.

It should be noted that in May 1986, the Workers Compensation Board of Manitoba clarified its policy related to pre-existing medical conditions. Because of the lack of data produced by the Workers Compensation Board, we are unable to evaluate the impact of this "clarification" on injured workers. However, several cases which were brought to the attention of the Committee, showed no real change in practice. Whereas before, benefits had been terminated "due to a pre-existing condition," after the approval of the statement of clarification benefits were terminated "due to a pre-existing condition not accelerated or enhanced" by the compensable incident. Factually, however, the cases were as described above, i.e. prior to the accident, the workers were able to do their jobs; following the accidents, they were not.

7) Wage Loss Augmentation

As noted earlier, in Manitoba the Workers Compensation Board uses a system of wage loss supplementation to partially address the issue of disability. Injured workers suffering a wage differential upon returning to work **may** be provided supplementary benefits, calculated with a formula including pre-accident wage, post-accident wage, and the appropriate maximum compensation. The formula, in simple terms, pays 75 per cent of the difference between pre-accident and post-accident earnings up to the ceiling in effect in the year of the injury.

However, several of the injured workers who presented at public hearings described difficulties related to the current method of wage loss supplementation.

As would be expected, some injured workers noted that their earnings during the year of injury were considerably over the compensable maximum for that year, resulting in ongoing loss of income despite supplementation on a wage loss basis. However, this problem, which is also true of temporary total disability benefits, relates more to the issue of maximum benefit levels than to the wage loss system proper.

In the case of recurrences of injury, however, the situation is somewhat different. Some injured workers described the lack of rehabilitation services available from the Workers Compensation Board prior to recent expansions of that department from 1982 on. They also described having to return to work at alternative duties (pre-accident jobs having been filled, or deemed by the workers to be physically unsuitable) at lower wages, without benefit of wage loss supplementation. Subsequently, if the same worker suffered another work-related injury or a recurrence of the original injury, both temporary total disability benefits and wage loss would be calculated on the basis of the more recent, lower wage rate. Some injured workers argued that in recognition of the lack of service available before 1982, often resulting in lowered income upon return to work, wage loss supplementation for the later injury or recurrence should recognize the higher wage at the time of the original injury.

It was noted by injured workers in receipt of wage loss benefits that their compensable wages were fixed at the level at the time of injury (also affected, in some cases as previously indicated, by the compensable maximum for that year). Therefore, each wage increase at the current employment acted simply to reduce the amount of wage loss supplementation, resulting in a fixed income with no increases over time. It was further noted that working overtime was of no assistance, since the Workers Compensation Board calculates wage loss supplementation on the basis of gross income. Therefore, overtime income also acts merely to decrease the amount of wage loss supplementation paid.

It should be noted that the current policy of the Workers Compensation Board indicates that since overtime earnings are taken into account in the calculation of temporary total disability rates, it must similarly be reflected in the wage loss calculation. However, a number of injured workers suggested that, in their cases, pre-accident overtime earnings were not included in the calculation of temporary total disability although they were included in the wage loss calculation. As in the case of other issues mentioned, injured workers suggested that consistency in the application of policy and procedure could not be taken for granted.

A major difficulty noted in relation to wage loss supplementation was the unreliability of the process leading to the production of the cheque, independent of any policy concerns. Presenters described delays in receipt of cheques, lost wage information, over payments, under payments, etc. In most cases, the Workers Compensation Board requires an actual cheque stub or pay slip before it will issue a cheque for wage loss benefits. This was a major source of aggravation and related to the major criticism of injured workers, that to be in receipt of wage loss benefits meant remaining within the system, i.e. being responsible to the Workers Compensation Board, rather than acting as fully independent and self-sufficient adults. In the words of one injured worker, "Prisoners are better off; at least they have a definite sentence."

8) Rehabilitation Services

Numerous presenters described to the Committee the lack of rehabilitation services available through the Manitoba Workers Compensation Board, prior to 1982. The Committee is also aware of the expansion of the Vocational Rehabilitation Services Department between 1982 and 1985, and the establishment of specific policies and procedures during that period.

But despite the obvious efforts of the current administration to expand and improve rehabilitation services, the Committee heard anger and frustration from some recipients of those services. The major theme related to the requirements of the department, regarding job search.

A significant number of injured workers explained that they were expected to look for employment without being provided with a clear employment goal or knowledge of where to look for employment appropriate to their physical conditions. Others indicated that although their personal physicians had stated employment was not feasible due to their physical limitations, they were still required to complete job search activities.

Some presenters described the job search requirements as being physically unrealistic and/or demeaning. The Committee spoke with injured workers who had had benefits suspended for non-cooperation by not fully meeting certain requirements, such as completion of a specified number of job contacts (for example, 5 or 10 per week), without medical justification, or by refusing to accept an employment situation which they believed to be inappropriate.

In summary, many injured workers who discussed the job search program found it to be insufficiently flexible in light of their physical circumstances, as well as their personal goals and desires. Injured workers described looking for jobs, with little guidance from Vocational Rehabilitation Department staff, and being forced to accept employment which they felt to be inappropriate to their physical limitations and/or skills and interests. One injured worker summarized the criticisms of many others in saying that, in general, the Workers Compensation Board's rehabilitation services would benefit from "less talking, more listening."

It was also suggested to the Committee that the Workers Compensation Board's Vocational Rehabilitation Services Department preferred to place injured workers on job searches, rather than in upgrading and academic retraining programs. Some presenters suggested that the perceived preference for job search over retraining reflects a concern for costs over appropriate programming on the part of the Vocational Rehabilitation Services Department, resulting in an avoidance of programs requiring a more long-term financial commitment.

It was not unusual for injured workers to characterize their relationships with Vocational Rehabilitation Services Department staff as adversarial. Many commented on what they experienced as the negative and judgemental attitudes of some Counsellors, Re-Employment Officers and management representatives. One worker stated that Vocational Rehabilitation Services Department staff "treated me like a child." Another provided his perception that staff members "don't treat you like a human being. I felt like a lower person than anyone else." The Committee quickly became aware that for the persons who addressed this issue with them, rehabilitation services were not seen as supportive or cooperative, but rather as directive.

Again, the Committee members are well aware that the injured workers who spoke with them were not necessarily representative of the injured workers receiving rehabilitation services. However, the frequency of complaints raised and the remarkable similarity of comments and experiences presented in this regard were noted by the Committee.

9) Independence and Self-Determination

Recurring as a theme throughout many of the presentations by injured workers was the experience of powerlessness—a sense of losing control over one's own life—associated with involvement in the workers' compensation system. The system was characterized as being controlling rather than supportive, and as demanding compliance with a vast catalogue of rules and regulations (many of which appeared to make little sense to those in receipt of service), rather than encouraging independence and self-reliance.

Several presenters compared involvement with workers' compensation to being on "welfare." Indeed, one stated a preference for welfare, saying, "Welfare officials are far more willing to listen." Still more compared the experience with that of being a criminal. For example, one presenter said, "Criminals have rights. You and me (sic) as citizens have rights. Injured workers have no rights." Another stated, "You give up every right as a human being, except the right to vote."

The Committee heard that, whatever its intentions, the Workers Compensation Board is perceived by some as discouraging initiative. For example, it was explained that efforts to plan toward alternative employment while in receipt of temporary total disability benefits are often unsuccessful, since the file may eventually be transferred to the Vocational Rehabilitation Services Department which may demand a different direction to vocational planning. It was suggested that this situation is made particularly frustrating by the fact that Vocational Rehabilitation Services Department assistance is often not made available at the time that the injured worker is initially experiencing concern about an eventual return to work (and trying to make plans toward that end), but only when the injured worker has been deemed as "not totally disabled."

Workers expressed their frustration at the ongoing requirement that they get permission and approval before making any plans. Some described the practical impossibility of being aware of all of the many rules and regulations, and the fear of having benefits terminated for transgression of an unknown regulation. In the words of one injured worker, the Workers Compensation Board "only wants to pay for eight hours but they want to control you for 24 hours."

The specific details varied from situation to situation. However, the perception of workers' compensation as representing independence and the self-determination of recipients, was clearly and consistently challenged. Perhaps the most eloquent statement was made by the injured worker who said, "They take away a man's dreams."

10) Summary

As earlier noted, the over 250 injured workers who spoke to the Committee presented a wide range of recommendations and concerns. This summary has touched upon only some of those more frequently heard. Also, it in no way does justice to the richness and complexity even of those issues mentioned.

The Committee feels that it is important to remember that recipients of workers' compensation benefits and services are not compensation experts; they cannot be expected to have a comprehensive understanding of the governing legislation, or of Workers Compensation Board policies and procedures. However, their perceptions are crucial because these people experience the system in a way different from any other participants; their concerns and perceptions are not merely intellectual or academic.

In other words, the way workers' compensation "feels" to injured workers, in a subjective, personal way is as essential to the analysis of the system as any objective analysis of legislation, policies and procedures. The Committee is grateful to those injured workers who made their feelings known candidly and often eloquently.

II. MAJOR CONCERNS OF EMPLOYERS

Employers and employers' associations that appeared before the Committee during public hearings, raised a significant number of concerns related to *The Workers Compensation Act*, Board administration and Board policies. It was the collective opinion of those employers who presented briefs in public hearings, that the following issues must be addressed by this Committee of Review. Employers and employers' associations, with few exceptions, endorsed the Workers Compensation Board model, as operated in Canada, and expressed a desire to see it maintained and improved.

The single greatest concern of employers and employers' associations was the **financial accountability** of the Manitoba Workers Compensation Board. Manitoba employers are concerned that the Board appears to be unable to fully determine the cost impact on assessment of significant adjudicative and policy changes. Employers were adamant that the Board should be able to develop realistic cost projections that would predict the impact on assessment rates of any proposed policy changes, thereby permitting an opportunity to evaluate the relative merit of the changes related to the increased costs. Several briefs suggested that before the Workers Compensation Board institute any change that could significantly influence the costs, these changes should be reviewed and approved by a third party (such as corporate board of directors or an agency similar to the Public Utilities Board), in order to determine the true impact of the proposed changes. Such a review should include a cost-benefit analysis of the proposed program.

The second greatest concern of employers and employers' associations relates to the Board's treatment of pre-existing conditions. It was the opinion of most employers that the Workers Compensation Board of Manitoba had broadened the interpretation of **"arising out of and in the course of employment"** to include a significant number of claims more related to heredity and lifestyle than to the workplace. Some employers suggested that the Workers Compensation Board should not attempt to rectify perceived shortcomings of the social welfare system, but rather these issues should be addressed by other agencies which have the responsibility and mandate to deal with public health. Should it be decided that the Workers Compensation Board would handle these cases as a matter of expediency, then the cost should be borne by the Manitoba Health Services Commission or some other agency in the health field, whose funding is not tied solely to the contribution of employers, but funded from the general revenues of the province.

A number of employers expressed dissatisfaction with the Board's unwillingness to share information related to the medical condition of an employee. Employers noted that this information is now available to Worker Advisors and other advocates (as well as to the workers themselves), and yet the employer who has responsibility for the well-being of that worker in the workplace does not have access to the medical information that is key to the reason for time loss, and which could have a bearing on the type of work that person is capable of performing. The employers pay for the system and they believe they have a right to this specific medical information. A similar concern arises, regarding access to **medical review panels**. At present, under the Manitoba *Workers Compensation Act*, the injured worker or the Workers Compensation Board may request a medical review panel, but an employer cannot. The employers believe that in disputed cases, referral to a medical review panel for impartial medical determination of the injury or condition should be an option that is also available to an employer.

A number of employers stated that the Board, in their opinion, fails to investigate some charges related to possible fraudulent claims of cases where time loss is far in excess of that required for the normal healing process. It was their opinion that the Board paid little or no attention to investigation requests made by employers, and that only in the most extreme cases was the Board willing to take any action.

It was the opinion of many employers and employer's associations that some form of **merit rating** would provide a fairer method of recognizing those employers who had above average safety performance and who made few claims on the system. This request is a response by frustrated employers who see workers' compensation assessment costs spiralling at a time when the claims experience of their individual firm is decreasing. Several employers noted that they were of the opinion that they were in the wrong assessment group, and that some form of merit rating would at least give them some respite from the ever-increasing assessment rates.

A common theme through many of the briefs was the view that the Board gave the appearance of having limited responsibility to the employers. This was reinforced when employer organizations were not consulted by government in the selection of the employer representative on the present Board, and when there appeared to be no effort made by the Board to communicate its changing objectives to employers.

It was the opinion of these briefs that employers must be permitted input into the selection of the Board (most particularly the selection of the employer representatives), and that the Board must maintain a reasonable level of communication with the various employer organizations.

The employers and employers' associations were almost unanimous in endorsing 90 per cent of net as being the most fair and equitable way of compensating injured employees. This formula will avoid the often-heard criticism that employee "A" is better off than employee "B," or in fact that employee "A" can earn more on compensation than s/he can when at work.

A number of employer briefs expressed dissatisfaction with a perceived increase in the number of small "p" political decisions made by the Board in awarding benefits in very doubtful cases, and thereby creating a significant number of retroactive appeals. It was the opinion of these briefs that adjudication must continue to be based on firm medical fact.

There was general support in the employers' briefs for sound rehabilitation policies that use existing resources in the community. There were a number of points made regarding rehabilitation, but the underlying theme throughout the briefs was that rehabilitation should be comprehensive and cost-effective and should have as its primary objective the return of the injured worker to meaningful, long-term employment as quickly as possible. The "return to work" principle appeared to many employers to have been lost somewhere in the process, and therefore they felt it was necessary to clearly state that "return to work" must be the rehabilitation goal.

An issue that was raised by smaller employers was the concern that the activity of advocacy groups such as the Worker Advisors put the smaller employer at a disadvantage, as there was no such service available to assist them in compensation matters. This issue was heightened by the inability or unwillingness of the Board to provide more than perfunctory information to the small employer when s/he did have a concern related to his/her assessment or particular claim. It was suggested than an office of Employers' Advocate would assist those smaller employers without resources to put forward their concern to the Board, with some hope of being heard.

In conclusion, it can be noted that most employers will continue to support workers' compensation as we know it in Canada, but if costs continue to rise unchecked, a growing number will demand changes in the fundamental concepts on which the system is based. A better working relationship must be established, and this can only happen when the system in this province is viewed to be operating in the best interests of both its constituencies.

III. MAJOR CONCERNS OF UNIONS

The concerns raised by trade unions at our public hearings can be grouped into three major categories. Firstly, they raised concerns related to the claims of their members. The claim-specific issues raised were entirely consistent with those raised by injured workers. However, unlike individual injured workers, the trade union representatives who presented briefs at our public hearings had seen more than one case and were, therefore, able to draw conclusions of their own about the policies and adjudicative practices of the Manitoba Workers Compensation Board. Many of the trade unions which presented, commented on the large amount of time devoted by staff and/or full-time officers of the union to their members' compensation problems. Those who had held such positions for some years commented that in recent years, the demands on their time from members with compensation problems had increased dramatically. This was attributed to several factors, including: increased awareness by members of their right to compensation for occupational illnesses and injuries, an increased number of appeals, and the increasing complexity of the compensation system itself. Many of those presenting, commented favourably on the assistance provided to the Worker Advisor Office.

Secondly, trade unions raised legal issues including:

- their desire for a legal entrenchment of the right to rehabilitation
- their desire for a legal entrenchment of the right of disabled workers to return to work with their pre-accident employer
- their desire for a schedule of occupational diseases, in the form of Regulation under the *Act*
- their concern that the rule of presumption [section 4(5) of the *Manitoba Workers Compensation Act*] has not been properly understood by adjudicators, who, it was argued, often placed the onus to prove a claim on the injured worker
- their desire for an expansion of compulsory, workers' compensation coverage to include all workers
- their desire for an external appeal tribunal. (The current system, where the Board of Commissioners is both the court of final appeal and is responsible for the fiscal management of the Board, was viewed by trade unions as an unacceptable conflict of interest.)

Thirdly, trade unions raised concerns about the policies and practices of the Manitoba Workers Compensation Board. The most common concerns were:

- disagreement with the Workers Compensation Board's average earnings policy. It was argued that the current policy of re-calculating earnings after 26 weeks was unfair.

- dissatisfaction with the current approach to compensating permanent disabilities. The schedule for rating permanent partial disabilities, it was argued, under-compensated many workers with permanent disabilities. It was also argued that wage loss provisions are not sufficient to provide full compensation for those who suffer a decline in earnings, due to a compensable condition. The current system of Special Additional Compensation was a particular point of concern, as unions saw those of their members whom the Workers Compensation Board considered to be unemployable, suffer considerable income reductions which became more significant over time. It was argued that the Workers Compensation Board should not, in the calculation of Special Additional Compensation, have the right to deduct monies received from benefit plans to which the injured worker had contributed (for example, private pension plans and the Canada Pension Plan).

- dissatisfaction with the current Rehabilitation program. Unions strongly expressed their criticisms of the current program, which, it was argued, is not sufficiently sensitive to the needs of injured workers and is often focused on claims control rather than true rehabilitation.

- disagreement with the current practice of the Workers Compensation Board to terminate or reduce benefits on the basis of the opinions of Board Medical Officers. Unions argued that the opinion of the treating physician should prevail.

- dissatisfaction with the current delays in the appeal process. It was argued that such delays impose severe financial hardships on injured workers.

Despite the above criticisms, unions supported the principle of workers' compensation and did not favour a return to tort law in cases of occupational illnesses and injuries.

CHAPTER 6

CLAIMS ISSUES

I. INTRODUCTION

It is necessary to place the remarks which follow into their proper context. In 1986 there were 54,228 claims for workers' compensation in Manitoba. Of these, approximately one-half involved no time loss at all. Of those which resulted in disability, in 78 per cent of the cases the worker returned to work in less than four weeks (see Figure 1). Yet some recent public comment has implied that injured workers will take advantage of the system, remaining off work longer than is necessary. While there may occasionally be individuals who would do so, the facts do not support the view that this is a major problem.

Therefore, we believe our recommendations for a system which is non-adversarial and primarily self-policing are reasonable.

II. ADMINISTRATIVE ISSUES

When we began our Review, we assumed that the two major focuses of our recommendation would be legal and policy changes. However, as we became more familiar with the operations of the Manitoba Workers Compensation Board, it became clear to us that a number of administrative practices within the organization were also of concern because, in our opinion, they interfere in the optimal functioning of a no-fault inquiry system. We have, therefore, chosen to comment on several issues which are purely administrative.

1. Adjudicative Delays

Delays in the adjudication process at the Manitoba Workers Compensation Board were a major concern to those injured workers who made verbal presentations to our public hearings. This was the third most commonly raised issue, mentioned by approximately one-fifth of the presentors. The delays described by claimants were not disputed by the Manitoba Board, so there is certainly a consensus that this is a problem. However, during the course of our Review, we saw no evidence that the Board is able to deal with this problem. As a Committee, we are unanimous in our belief that in the case of workers' compensation, justice delayed is justice denied. It is not acceptable to have injured workers waiting a year or more for decisions in their cases. After all, few of us have the financial resources to survive many months with no income.

These delays occur at every level of the adjudication and appeal system. A file is opened when the Workers Compensation Board receives one or more of the three initial reports: the Employer's Report (Form 2), the Worker's Report (Form 3), or the Doctor's Report (Form 4). Whenever one report is received by the Board, the other two are solicited.

The Workers Compensation Act of Manitoba, section 15(1) states:

> **"In case of accident to a workman in his employment, every employer shall, within three days**
>
> > **(a) from the day upon which the workman reports the occurrence to him; or**
> >
> > **(b) from the day when he otherwise learns of it; which ever day is earlier, report the accident and the injury resulting therefrom to the board, and also to any local representative of the board at the place where the accident has occurred."**

It has been the explicit practice of the Manitoba Workers Compensation Board to **ignore this legislative provision**. Current Board practice is to initially allow two weeks, after the Board has been notified of an injury, before the employer is reminded to report. After this initial two-week period, further reminders are sent. Although it is technically not necessary for the Board to have obtained a copy of the Employer's Report before adjudication can occur, from our investigations it appeared that only rarely did adjudicators take the step of adjudicating without an Employer's Report. Some claimants have even been sent letters advising them that their employer has not reported, and suggesting that perhaps they (the injured worker) could pursue this matter with the employer in order to speed up the adjudication process. (A copy of this form letter follows.)

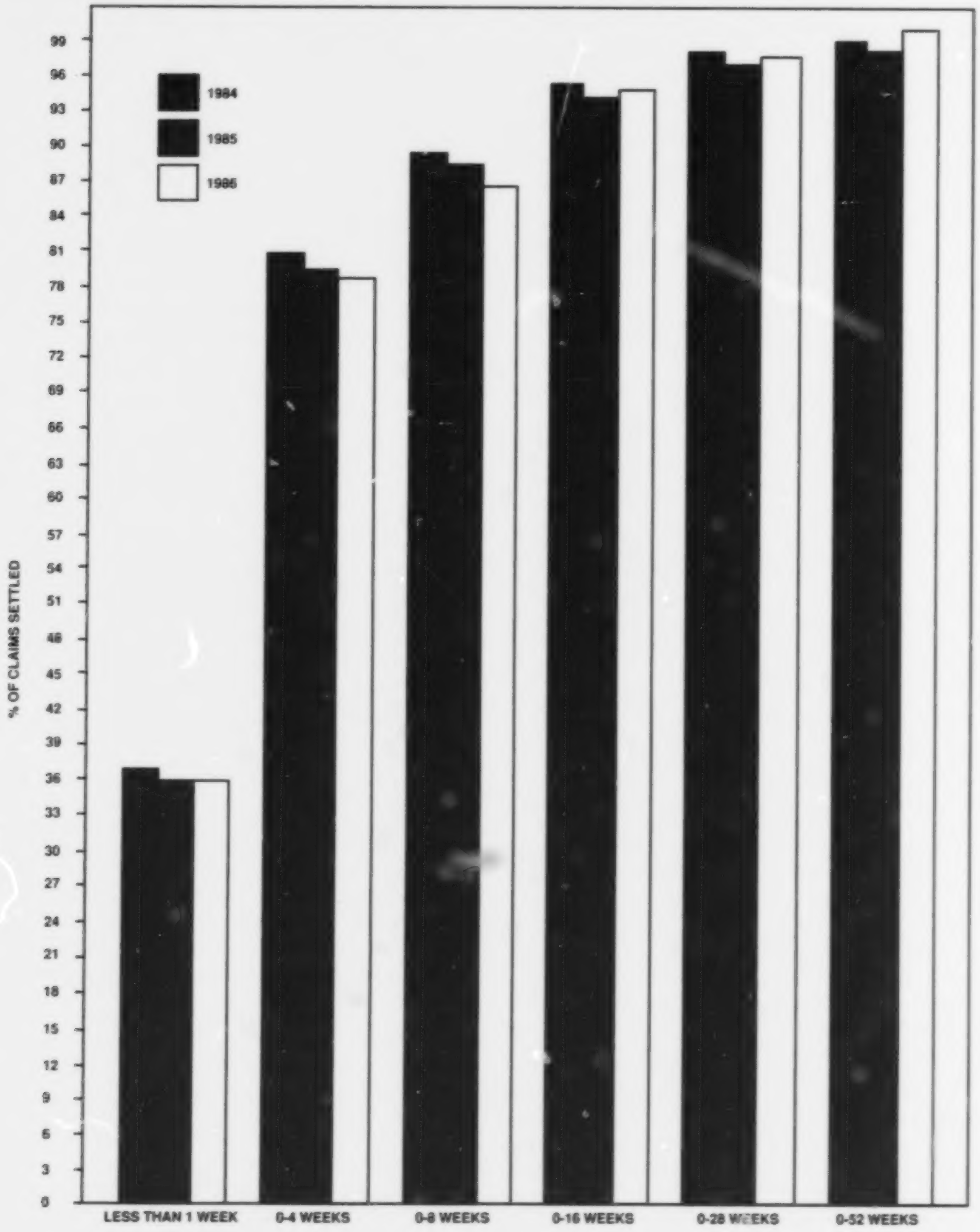
Even more serious delays may result when injured workers believe that having notified their employer of an occupational illness or injury, they have fulfilled their responsibilities and do not, themselves, notify the Board. If these employers do not speedily notify the Board, as required by the current legislation, the Board has no knowledge that a potentially compensable injury has occurred.

The obligation of employers to speedily report all compensable accidents and illnesses must remain in *The Workers Compensation Act*. The Board itself must be prepared to enforce those provisions of the legislation. At the same time, the Board should actively pursue new reporting mechanisms (such as electronic mail) which would encourage speedy reporting. Any such system would have to guarantee the confidentiality of the data being electronically transmitted.

Another cause of delay in the initial adjudication process is the delay in receipt of medical reports. (This issue will be dealt with at length in the next section.)

FIGURE 1

Number of weeks on temporary total disability benefits (settled time loss claims only) by year in which claim was settled



Claims Services

WCB

The Workers Compensation
Board of Manitoba

333 Maryland Street • Winnipeg R3G 1M2 • Telephone 786-5471; rural Manitoba call Toll Free 1-800-362-3340

ACCIDENT DATE	FIRM NUMBER	CLAIM NUMBER ▶	◀ QUOTE THIS NUMBER IN ALL COMMUNICATIONS

DEAR SIR OR MADAM:

WE REGRET THAT FURTHER CONSIDERATION OF YOUR CLAIM HAS BEEN DELAYED BECAUSE WE HAVE BEEN REQUESTING AN EMPLOYER'S REPORT OF ACCIDENT AND TO DATE WE HAVE NOT RECEIVED A REPLY.

WE ARE TRYING TO OBTAIN THIS INFORMATION AND ONCE IT HAS BEEN RECEIVED, IMMEDIATE ATTENTION WILL BE GIVEN TO YOUR CLAIM. PERHAPS, YOU MAY WISH TO HASTEN DEVELOPMENTS BY URGING YOUR EMPLOYER TO SUBMIT THIS INFORMATION PROMPTLY.

YOURS TRULY,

CLAIM SERVICES

212A
04/84

IMPORTANT:
- In order to serve you better we need proper identification. Print your name and claim or firm number in all communication.
- A request for reconsideration of a decision should be in writing and include reason or reasons for the request.
- If you make an appointment before coming to the Board's offices, it will help avoid delays.

Our Committee examined the period of time from the date of a compensable injury to the date of first payment to the injured worker. In December 1984, a random sample of files showed that, on average, there was a 15.75-day period of time from injury to payment. This was well within the Board's internal goal of 20 days. However, by October 1986, the length of time had increased to 37.58 days. The Special Claims Unit, which handles all claims for occupational illnesses, was excluded from these surveys. This increased delay, therefore, is in reference to the more straightforward claims for occupational injuries. The following chart illustrates the extent to which delays in primary adjudication have become systemic:

CLAIMS DEPARTMENT — LENGTH OF TIME REQUIRED TO PRODUCE FIRST CHEQUE*

TIME IN DAYS

	Date of Accident	Date Notification Received	Date Form 3 Received	Date Claim Approved	Date Cheque Issued	
Survey Date					**Average Total Days Elapsed**	**Average Days Elapsed Since Notification**
Dec. 10/84	4.42	6.56	2.63	2.15	15.75	11.33
Jan. 23/85	5.85	8.00	2.85	2.10	18.81	12.96
Mar. 18/85	6.04	7.44	4.23	2.13	19.83	13.79
June 11/85	5.54	8.21	2.81	2.96	19.52	13.98
Aug. 15/85	7.94	12.50	10.17	2.79	33.40	25.46
Oct. 21/85	7.58	16.02	5.98	2.94	32.52	24.94
Dec. 17/85	8.65	11.90	9.10	3.69	33.33	24.68
Feb. 14/86	8.85	15.81	8.44	2.90	36.00	27.15
Apr. 24/86	7.44	11.46	6.79	3.35	29.04	21.60
Oct. 10/86	11.52	15.48	7.23	3.35	37.58	26.06
WCB. Goal	5.00	7.00	4.50	3.50	20.00	15.00

* These figures are based on a sample of 48 files per survey date. Six files were selected from each "desk" (ie. each alpha grouping). The files ae randomly selected by the Data Processing Department. The survey which would normaly have been done in June 1986 was postponed until October 1986. **THE SPECIAL CLAIMS UNIT WAS EXCLUDED FROM THESE SURVEYS.**

This information substantiates the statements made by injured workers at our public hearings regarding the delays in primary adjudication. We were unable to pinpoint one factor which led to this significantly increased waiting period. It is noteworthy that during the same period of time, the Claims Department staff's workload increased much more than did the number of new claims. In September 1984, Claims Officers handled an average of 54 files per day, while Claims Processors handled an average of 115 files per day. In June 1986, Claims Officers handled an average of 86.45 files per day—an increase of 60 per cent in 21 months. And Claims Processors handled an average of 134.1 files per day—an increase of 16.6 per cent in 21 months. Yet, despite this increased workload, it took longer for injured workers to get their first benefit cheques from the Board. It appears that while claims were handled more frequently, decisions were made about those files less frequently.

Once the initial adjudication process is complete, the injured worker or the employer may appeal that decision. The appeal process is also unacceptably long. Having waited, in 1986, an average five weeks to be notified by the Workers Compensation Board that his/her claim for compensation has been denied, the injured worker's first appeal is to the Review Committee of the Board. However, no claim will be examined by the Review Committee until the original adjudicator has had an opportunity to re-examine this decision.

After waiting five weeks for a decision, this hypothetical claimant, having received a negative decision from the Claims Officer, immediately writes to the Board to object to the decision. In our experience, the process of having the Claims Officer review the original decision, discuss it with a supervisor, record the decision on the file and advise the claimant in writing, takes approximately three weeks. The file is then placed on the waiting list for consideration by the Review Committee. **This process is acceptable only if its purpose is to allow adjudicators to quickly review their original decisions. The Committee is unanimous in its belief that the current system of returning the file to the prior adjudicator for comment following the receipt of an appeal is unacceptable.**

When our Review began, the waiting period for a case to be considered by the Review Committee was three to four months. By the fall of 1986, it had increased to five to six months. Our hypothetical claimant, then, appealing as soon as s/he has received a negative decision, will wait approximately eight months for a second-level decision from the Workers Compensation Board.

The Review Committee is composed of three experienced senior adjudicators. One would expect them to be able to quickly read the information on file and make their decision. The real reason for the delay is the large number of cases awaiting review. During 1986, this averaged 165 at any time.

Effective October 1, 1986, the Board of Commissioners changed the structure of the Review Committee. Prior to that date, a Committee of three senior adjudicators considered all claims. After October 1, each of the three was empowered to adjudicate individually. The stated purpose of this change was to reduce the backlog of claims and, hence, the delays in appeals to Review Committee. **Unfortunately, as of December 31, 1986, this had been largely unsuccessful.** With the exception of October 1986, when the Review Committee made 72 decisions, the number of claims adjudicated per month after the change in structure has remained in the mid-forties, with a waiting list at month's end of more than 160. The number of new appeals being referred to the Review Committee has not increased during the year.

If the outcome of an appeal to the Review Committee is negative, and if the claimant wishes to pursue his/her appeal, s/he must so advise the Board in writing. The file will then be returned to the Review Committee for further consideration, thereby increasing the workload and leading to further delays. **This procedure is unacceptable. Once a request has been made for an appeal to the Board of Commissioners, the case should proceed there forthwith.** In the fall of 1986, the waiting time for a Board hearing was approximately three months. The major reason for this delay is that the Board hears, on average, only 90 appeals per year.

Following the hearing, the Board takes, on average, six weeks to give the claimant a written decision in his/her case. **Thus, even the most straightforward appeal takes one year from start to finish. This is unacceptable.**

We cannot overstate the necessity of a speedy system of adjudication and appeal. In workers' compensation, justice delayed is justice denied. Delays in primary adjudication and in the appeal system mean that injured workers, their friends and families, all lose faith in the compensation system. The mistrust and hostility which results from waiting five weeks for a first cheque, or 18 months for an appeal, do not disappear easily or quickly.

RECOMMENDATIONS

12. **Section 15(1) of the current *Act*, regarding the obligation of employers to report to the Workers Compensation Board within three days of their notification, should remain. Its provisions should be enforced by the Workers Compensation Board. The Board should pursue electronic mail as a reporting mechanism and ensure the confidentiality of data so reported.**
13. **Injured workers who appeal decisions of the Workers Compensation Board have the right to speedy decision-making. Time limits, congruent with our recommendations regarding a new appeal structure, should be incorporated into the legislation. For example, 30 days for primary adjudication, 60 days for a written decision at the first level of appeal and 90 days for a written decision at the final level of appeal would be reasonable. Where the Board can show that extra time is required for a thorough inquiry, an extra 30-day extension should be allowed. *These time limits should be maximums; they should not become the norm.***
14. **Once a claim has been denied or terminated by an adjudicator, it should return to that adjudicator, only for a speedy review. The adjudicator should not place a second opinion on the file before it proceeds to the next level of adjudication.**
15. **Once an appeal has been denied by the Review Committee, and the claimant wishes to proceed with a further appeal, it should proceed immediately to the Board of Commissioners for appeal.**
16. **In order to assure appellants that the second-level appeal process is a meaningful one, the Review Committee must become more independent of primary adjudication and the administration of the line departments.**

2. Medical Reporting Procedure

In September 1985, after negotiations with the Manitoba Medical Association, the Workers Compensation Board of Manitoba made significant changes to the procedure by which doctors report to the Board. The impact of these changes was negatively commented upon many times in the course of our public hearings, both by injured workers and by unions. Because it was the subject of so much negative comment and because it represents an example of problems that occur when the system-wide implications of procedural changes are not fully considered, we have chosen to comment upon it at length.

When doctors treat a patient who is claiming workers' compensation, the bills for their services are sent to the Workers Compensation Board rather than to the Manitoba Health Services Commission. Until September 1985, doctors were paid according to the fee schedule negotiated between the Manitoba Health Services Commission and the Manitoba Medical Association; **but in addition, they received a percentage of the scheduled fee as a "reporting fee."** For some years, Workers Compensation Board management had complained that some doctors reported more frequently than the Board felt was necessary (the implication being that this was a way for doctors to increase their incomes), that some doctors' reports were illegible and that some physicians reported only what the patient told them and not their own findings during examination. This situation was worsened by the Workers Compensation Board's reliance, in many cases, on medical reports every two weeks, in order to continue the payment of temporary total disability benefits. These concerns led to negotiations with the Manitoba Medical Association, which resulted in a new medical reporting fee agreement between the two bodies. Effective October 1, 1985, doctors were paid a flat reporting fee ($10-$15) in addition to the negotiated fee for patient diagnosis and treatment. This represented a significant increase. However, **the Board would no longer pay for certain reports.** In a September 1985 letter to Manitoba doctors, the Board stated the following:

> In the following cases, reporting fees will not be paid:
>
> 1. *Illegible Reports*—where the writing cannot be read
> 2. *Incomplete Reports*—where insufficient information is provided. This generally would result from failure to provide useful information about the history, diagnosis and treatment, actual time loss authorized and date of next appointment
> 3. *Unsolicited Reports*—where reports (either on "no time loss" claims or progress reports) are not requested by the Workers Compensation Board of Manitoba
> 4. *Reports where objective findings are not stated*

From the point of view of the injured workers and their representatives, who presented their views at our public hearings, it is items 3 and 4 above that have caused particular hardship.

The Board's requirement that all reports, other than initial reports on "time loss" claims, must first be requested by them (combined with a practice in the Claims Department of not paying ongoing temporary total disability benefits without current medical support), has led to many delays in the receipt of benefits. Many injured workers reported to us that when their expected cheque did not arrive, they would call the offices of the Board, only to be told that there was no current medical documentation on file. Of course, most injured workers found this difficult to understand if they had continued to see their doctor on a regular basis. Their phone call would prompt a staff person to write the doctor requesting a report. And no cheque would be issued until this report had been requested by the Claims Department, written and mailed by the doctor and received and reviewed by the Claims Department. The unnecessary delays inherent in such a system are obvious to us. Ironically, one of the major concerns of those Claims Department staff members to whom we spoke, was that they had to deal with too many calls from injured workers complaining that they had not received a cheque at the expected time.

The Board has begun to acknowledge that this protocol has caused some injured workers to suffer financially. However, we disagree with their proposed solution, which is to have staff of the Board telephone doctors for verbal reports. Doctors object to this proposal because they view it as a way in which the Board may potentially avoid paying the fee for a written report. The Workers Compensation Board staff members advised us that, consequently, some doctors have refused to convey such information over the phone. We also object because of the potential for misunderstanding when a medical opinion is conveyed over the phone and entered into the claimant's file, in writing, by Board staff. Such entries would not be signed by the physician in question and would be problematic during an appeal process, as there would be no written evidence of what the doctor intended to report to the Board.

Such a system cannot work. If the Board is to entirely eliminate unnecessary medical reporting, while still ensuring the speedy, regular payment of injured workers, claims would have to be paid without current medical support. This is not an acceptable alternative. **We therefore recommend that the Board return to its previous practice of accepting unsolicited doctors' reports.**

The second issue of concern regarding this policy is the definition of the use of the term "objective medical evidence." In medical terminology, symptoms are subjective findings; signs are objective findings. Pain, for example, is a symptom—by definition, a subjective finding. A report from a doctor stating that a claimant had, while lifting a heavy object at work, experienced a sharp, sudden pain, would not constitute an acceptable report to the Manitoba Workers Compensation Board, unless the doctor also reported some **objective** finding, such as swelling, muscle spasm, x-ray findings, etc. There may be no such findings—in which case, under the current policy the claim would be rejected.

The assumption underlying such a policy appears to be that patients cannot be trusted to describe their own symptoms or state of health. As one staff member said to us, "Around here, patients are assumed to be guilty until proven innocent." This is contrary to the teachings of medicine. Doctors in training are taught that the patient history, that is the patient's own description of his/her condition, is the most important element in making an accurate diagnosis. A health care system that required similar standards of proof could not function.

This policy has caused a related procedural problem. Claims Officers and Claims Processors, in order to be certain that medical reports contain "objective" evidence, send those reports to the Board's Medical Officers for an opinion as to the admissibility of the report. This leads to further delays in benefits for injured workers. (This practice is closely related to the larger issue, raised many times at public hearings, of the role of Board Medical Officers. The single most common complaint of injured workers at public hearings, was that the opinion of their treating doctor was overruled by a Board Medical Officer.)

While we share the Board's concern that medical reports submitted for adjudicative purposes should be clear and comprehensive, we disagree with the method which they have chosen to reach that end.

RECOMMENDATIONS

17. **The Manitoba Workers Compensation Board should negotiate a new medical reporting protocol and fee schedule with the Manitoba Medical Association.**
18. **Such a protocol should ensure that physicians report to the Workers Compensation Board as often as is necessary to ensure that the Board is able to make adjudicative decisions without interruptions in benefits to injured workers. The current policy of not accepting unsolicited medical reports should be reversed.**
19. **Such a protocol should ensure that in order to be accepted by the Manitoba Workers Compensation Board, medical reports be clear and comprehensive. Medical reports should contain objective findings where such are available, but medical reports should not be rejected because of the absence of objective medical findings.**

3. Lost Records and Correspondence

During the course of public hearings, approximately 20 injured workers complained that correspondence and records relating to their claims for workers' compensation had been lost or temporarily misplaced by the Board. These injured workers further contended that these administrative errors led to delays in benefit payments. Several examples were outlined, in which an injured worker claimed that s/he knew the missing documentation had been mailed or delivered, while the Workers Compensation Board simultaneously contended that no such information had been received. The impression left with these injured workers was that they were simply **not believed** and that it was entirely up to them to attempt to obtain copies of the missing documents—whether these be medical reports, prescription drug bills, or pay stubs submitted for the calculation of wage loss benefits. Those who had frequent problems devised strategies for self-protection. They used the Certified Mail service of Canada Post (in which Canada Post mails a copy of the recipient's signature of receipt to the sender) or they hand delivered the necessary documents to the Board's offices and obtained a receipt in person.

Several injured workers complained that their entire files were lost by the Workers Compensation Board. In the one case investigated by the Committee, this was substantiated. The loss of the file, in this case, caused a four-month interruption of permanent partial disability benefits.

The Workers Compensation Board is a large system, handling many hundreds of thousands of documents every year. While most are handled without problems, some will inevitably go astray. The system's response is, therefore, critical to maintaining community good will. That response has, in some instances, been lacking. The file-tracking system, implemented over the last three years, has led to significant improvements in the day-to-day work of getting the right piece of paper to the right place within a reasonable period of time. The Workers Compensation Board should continue to work to improve this system.

4. Calculation of Average Earnings

The initial calculation of benefits payable (currently 75 per cent of gross earnings up to an earnings ceiling in 1987 of $32,000 or a maximum benefit level of $24,000) is done by the Finance Department. The fact that this work is done outside of the Claims Department is problematic for claimants who feel shuffled between departments, and for claims adjudicators who must explain the Finance Department's decision to those claimants since, in some instances, it may become a contentious issue in the claim. *The Workers Compensation Act* currently states:

> **Calculation of average earnings and earning capacity of workman.**
>
> 37 The average earnings and earning capacity of a workman shall be determined with reference to his average earnings and earning capacity at the time of the accident, and may be calculated upon the daily, weekly, or monthly, wages and other regular remuneration which the workman was receiving at the time of the accident, or upon the average yearly earnings of the workman for one or more years prior to the accident, or upon the probable yearly earning capacity of the workman at the time of the accident, **as may appear to the board best to represent the actual loss of earnings suffered by the workman by reason of the injury,** but not so that his average earnings shall be deemed in any case to exceed the rate of the maximum annual earnings established under section 37.1.
> **(emphasis added)**

It is this issue of determining what "best represents the actual loss of earnings," which has become a contentious one in Manitoba.

During the course of public hearings, several injured workers complained about the exclusion of some of their income from this initial calculation of their benefit level. The most frequently raised concern was that, in some cases, overtime commonly worked, was **excluded** from the calculation of the benefit level, thus lowering the amount paid. However, if those same workers returned to work after their compensable injury, and suffered a wage loss as a result, they found that any overtime worked was being considered as regular earnings by the Workers Compensation Board, thus reducing or eliminating the wage loss benefits payable. For example:

pre-accident earnings:

regular earnings $10.00 x 40 hours = $400
plus average overtime $15.00 x 4 hours = $ 60
total = $460 / week
workers compensation benefits paid (75% x $400) = $300 / week

post-accident earnings:

regular earnings $ 6.50 x 40 hours = $260
plus overtime $ 9.75 x 4 hours = $ 39
total = $299 / week

wage loss payable:

$400 ÷ $300 = $100 x 75% = $ 75 / week
= $3900 / year

actual wage loss:

$460 ÷ $300 = $160 x 75% = $ 120 / week
= $6240 / year

annual difference = $2340 / year

The issue of wage loss benefits will be dealt with in more detail elsewhere in this Report.

Historically, the calculation of benefit levels has not been a controversial issue with injured workers or employers. This has changed, however, with the implementation of major policy changes by the Board of Commissioners in May 1985 and again in May 1986. As the Board stated in Board Order 77/85

> A Board Policy dated August 1, 1973 provides for the use of actual earnings to be used for temporary or permanent compensation, except when submissions reasonably establish that such a basis does not best represent the actual loss of earnings ... **While this practice can be appropriate for short term compensation benefits, in some cases it creates an inflated earnings picture when projected to an annual basis.** (emphasis added)

With this stated goal of reducing benefits payable to long term claimants, the Board introduced the practice of writing claimants to obtain detailed prior earnings information. A copy of this letter follows.

After 26 weeks, the following changes are then made to the calculation of benefits payable.

1) the claimant's average earnings are recalculated to include all employment-related income during the one **or** two years prior to the injury.

The Workers Compensation
Board of Manitoba

333 Maryland Street • Winnipeg R3G 1M2 • Telephone 786-5471; rural Manitoba call Toll Free 1-800-362-3340

GLOSSARY 80 "m"

LETTER TO CLMT RE AVERAGE EARNINGS INCLUDES
QUESTIONNAIRE AND TWO RELEASES

NAME
ADDRESS

DATE

Your Claim Number is

Dear :

It is the policy of the Workers Compensation Board to review all long term disability claims to ensure that injured workers are being correctly compensated for loss of employement related income.

In order to determine whether you are receiving benefits which truly reflect your loss of employment related income from this accident, additional information is needed. This information will remain confidential and will be used solely for purposes related to your claim.

We require that you complete the attached questionnaire and return it to our offices along with the attached releases, all signed where indicated.

Failure to comply with this request by__date__will result in a reduction of your total temporary disability benefits to the current minimum compensation level, should your disability period exceed 26 weeks in total.**

Yours truly,

Claims Officer
Claims Services

/
Enclosure

*Dicta typist to insert date. Use one month from date of letter.

IMPORTANT
To serve you better

- Proper identification is required when dealing with the Board for employers, the firm name and number should be stated. For matters involving workers, the worker's full name and claim number should be given

The Workers Compensation
Board of Manitoba

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AVERAGE EARNINGS QUESTIONNAIRE

Claimant's Name:
Claim Number :

1. Were you unable to work due to sickness or injury in the two years prior to this accident? Yes ( ) or No ( ). If yes, when were you off work and were you paid during this period by your employer? Yes ( ) or No ( ).

2. Have you lost any other employment related income (must have been declared for income tax purposes) as a result of this accident? Yes ( ) or No ( ). If yes, please explain the type of income loss and the amount.

3. Did you receive any social assistance (welfare) in the two years prior to this accident? Yes ( ) or No ( ). If yes, please give dates and agency/agencies involved.

4. Did you receive any Unemployment Insurance benefits in the two years prior to this accident? Yes ( ) or No ( ). If yes, state dates and amounts received.

5. Please provide names and addresses of employers for whom you worked in the two years prior to this accident. Give the dates worked as well.

I certify that the information given above is true. I agree to notify the Workers Compensation Board of Manitoba immediately of any changes in circumstances affecting this claim, including any return to work or any income earned from employment.

Date ______________________ Signature ______________________

IMPORTANT
To serve you better

- Proper identification is required whenever you contact the Board. Please give your **name** and **claim** or **firm number**.
- If you **make an appointment** before coming to the Board's offices, it will help avoid delays.

**The Workers Compensation
Board of Manitoba**

WCB

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LETTER TO AGENCIES OTHER THAN REVENUE CANADA RE AVERAGE EARNINGS

GLOSSARY 8 "E"

LETTER TO SOCIAL ASSISTANCE
WELFARE OR U.I.C.

DATE

Claim Number

Dear Sirs:

RE:
SIN: ______________________

It is the policy of the Workers Compensation Board to review all long term disability claims to ensure that injured workers are being correctly compensated for loss of employment related income.

In order to determine whether they have been receiving benefits which truly reflect their loss of employment related income from their accidents, additional information is required. This information will remain confidential and will be used solely for purposes related to their claim.

CLMT'S NAME has been advised that HE/SHE has received benefits from you sometime during the two years prior to HIS/HER accident of DATE. In this respect, it would be appreciated if you would supply us with the following information:

1. The dates on which HE/SHE was in receipt of benefits.

2. The type of benefits HE/SHE was in receipt of.

3. Please indicate the total amount of benefits received.

Continued ...../2

IMPORTANT
To serve you better

• Proper identification is required when dealing with the Board for employers, the firm name and number should be stated. For matters involving workers, the worker's full name and claim number should be given.

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NAME
Page 2

DATE

We have enclosed a copy of an Information Release Form signed by CLMT'S NAME allowing you to release the above information to us.

Thank you in advance for your co-operation in the above matter.

Yours Truly,

CO NAME
Claims Officer
Claim Services

/INITIALS
Enclosure

IMPORTANT
To serve you better

- Proper identification is required when dealing with the Board for employers, the firm name and number should be stated. For matters involving workers, the worker's full name and claim number should be given

2) any Unemployment Insurance benefits received are included in this calculation. **(This results in claimants receiving benefits calculated as 75 per cent of the Unemployment Insurance benefit which is itself 60 per cent of gross earnings [up to an insurable maximum], or benefits of 45 per cent of their actual earnings.)**

3) any social assistance benefits received are deemed to be equivalent to the provincial minimum wage and are included in this calculation.

The following example was prepared by staff of the Board's Finance Department to demonstrate the implementation of this average earnings policy.

Note that in the example provided, the average earnings were calculated on the basis of 129 weeks, or 2 1/2 years, prior to the accident date (July 1, 1985). In this case, therefore:

1. actual pre-accident earnings	$ 650 / week
2. actual benefits paid —1st 26 wks (75% x 1985 maximum earnings of $577 / week)	$ 432.75 / week
3. actual benefits paid—after 26 weeks (75% x $456)	$ 342.00 / week
4. reduction in benefits	**$ 90.75 / week or $4719.00 / year**
5. real income loss (includes effect of maximum earnings provision [ceiling] and average earnings policy) [(75% x $650)—(75% x $456)]	$ 145.00 / week $7556.00 / year

"1. CLAIMANT EARNING PATTERN

Dates	No. of Weeks	Place	Rate per Week	Total Earnings
Jan/83-Mar/83	12	U.I.C.	300	$ 3,600.00
Apr/83-Sep/83	26	Welder	600	15,600.00
Oct/83-Mar/84	26	U.I.C.	300	7,800.00
Apr/84-Sep/84	26	Welder	600	15,600.00
Oct/84-Mar/85	26	U.I.C.	300	7,800.00
Apr/85-Jul 1/85	13	Welder	650	8,450.00
	129			$58,850.00

2. AVERAGE EARNINGS
$58,000.00 ÷ 129 = $456.00 per week"

In Board Order 77/85 the Board further determined that:

> where, through the claimant's actions or through the actions of the claimant's representative, information regarding the confirmation of the average is delayed, compensation payments after 26 weeks shall be based on the current **minimum** compensation level. **(emphasis added)**

In our opinion, average weekly earnings should be calculated as the greater of:

1) one fifty-second of the actual earnings of the injured worker for the 12 months immediately preceding the commencement of the loss of earnings as a result of the injury, or

2) the rate of daily, weekly, monthly or other regular earnings that the worker was receiving at the commencement of the loss of earnings as a result of the injury.

In no case should the average weekly earnings for compensation be greater than the maximum insurable earnings level set out in *The Workers Compensation Act*.

RECOMMENDATIONS

20. The current Workers Compensation Board policy regarding the calculation of average earnings should be immediately revoked. Once a benefit level has been established by the Board, those benefits should not be reduced unless the original calculation was based on misinformation.

21. Average weekly earnings should be defined in *The Workers Compensation Act* as the greater of:

1. one fifty-second of the actual earnings of the injured worker for the 12 months immediately preceding the commencement of

the loss of earnings as a result of the injury, or

2. **the rate of daily, weekly, monthly or other regular earnings that the worker was receiving at the commencement of the loss of earnings as a result of the injury, converted to a weekly amount.**

In all cases, average weekly earnings should be subject to the maximum insurable earnings level set out in *The Workers Compensation Act*

22. **The Workers Compensation Board should not require that injured workers provide them with copies of income tax returns and other such confidential information.**

5. Interdepartmental Relations

Some of the most significant problems for the Claims Department occur in the manner in which the Department interacts with other Departments, most notably the Finance, Medical, Medical Aid and Rehabilitation Departments. **Much of the responsibility for claims adjudication has been removed to those other Departments. In our estimation, this creates confusion, both within and outside of the Workers Compensation Board. Additionally, it removes from claims adjudicators their sense of ownership and responsibility for a claim.**

A. Finance Department

The calculation of average earnings (and, therefore, the determination of benefit levels) is the responsibility of the Finance Department. However, whenever claimants question their benefit levels, Claims Officers respond to their queries. Since this has recently become a more controversial issue, there is greater pressure on Claims Department staff to explain, and to take responsibility for, contentious decisions with which they may or may not agree. Claimants, understandably, become angry and frustrated when they are told by "their" Claims Officer or Claims Processor that these staff members are not responsible for deciding how much money the claimant will receive.

Another point of overlap between the two Departments, is the requisitioning of benefit cheques. It appears that the approval of a claims adjudicator is a necessary but not a sufficient requirement to have a temporary total disability cheque issued. The Finance Department may intervene to hold or to query a cheque, thus making "superadjudicators" out of clerical staff. Internally, this contributes to the feeling prevalent amongst staff, that whatever problems exist must be the responsibility of others, in another department. Externally, it contributes to a sense in the community that the Board is a massive, uncoordinated bureaucracy.

B. Medical Aid

The Medical Aid Department is responsible for the payment of bills from health care practitioners, and for the adjudication and payment of requests from claimants for travel expenses and medical expenses related to the compensable injury. Most Medical Aid benefits, other than the payment of doctors' bills, are currently provided by the Workers Compensation Board in a discretionary manner and, therefore, each request is adjudicated by Medical Aid Department staff. As is the case between the Claims Department and the Finance Department, removing adjudicative responsibilities from claims adjudicators creates significant problems, both internally and externally.

The Medical Aid Department, unlike other departments, does not report directly to the Chief Executive Officer. The person in charge of the Medical Aid Department is the Assistant Director of Finance. **As a Committee we are concerned that the Finance Department, which should be a service department, has become a line department making major adjudicative decisions.**

From the viewpoint of totally disabled claimants, the system must be confusing. A Claims Officer or Claims Processor has approved their claim, but not the amount of money they will receive; that is done by a Payments Clerk in the Finance Department. Decisions about what other money and services they will or will not receive (for example, prescription drug costs, travel expenses, aids such as crutches, etc.) are made by yet another employee of the Finance Department. The longer a claimant is involved with the Workers Compensation Board, the more decision-makers there will be involved in his/her claim—Claims Processors and/or Claims Officers, Medical Aid staff, Finance Department staff, Medical Officers, Vocational Rehabilitation Counsellors, Re-employment Officers. Each of these may make decisions about the amount and type of benefits payable to a claimant. **We have come to the conclusion that the Workers Compensation Board requires major changes, in order to provide a more efficient and integrated service to injured workers and to the community as a whole. (The reader is referred to the chapter of this Report which describes our proposal for a new Client Services Department.)**

C. Medical Department

During the course of our public hearings, we frequently heard complaints from injured workers who believed that the opinions of their own doctors were being overruled by decisions of Board Medical Officers. Our own investigations confirmed that this was common practice at the Manitoba Workers Compensation Board. In part, this has been the result of Board policy. It is also the result of adjudicators with little time to adjudicate; of the respect which most people, including claims adjudicators, have for doctors; and of the belief, held by some, that "malingering workers and lenient doctors" in the community are taking advantage of the compensation system. These factors, together with the unwritten lore of workers' compensation, have created a system where much adjudication occurs, de facto, in the Medical Department. The relevant Board policy, entitled *Procedure—Referral of Claim Files to Medical Department or Chiro. Consultant*, dated February 15, 1984, reads in part, as follows:

> "I REFERRAL BY THE CLAIMS DEPARTMENT
>
> 1. During the initial adjudication process, files related to the following conditions should be discussed with a Medical Officer prior to adjudication:
>   - a) frostbite
>   - b) ganglion
>   - c) hearing loss
>   - d) cardiac conditions
>   - e) vibration induced white finger disease
>   - f) tenosynovitis
>   - g) epididymitis
>   - h) lead poisoning
>   - i) emphysema
>   - j) asthma
>   - k) asbestosis
>   - l) silicosis
>   - m) pneumoconiosis
>   - n) cancer
>   - o) carpal tunnel syndrome
>   - p) dermatitis
>
> The following situations should also be referred:
>
> 2. Claims where the period of disability appears to be prolonged in relationship to the nature of the injury.
> 3. Claims where there is an indication on file of a pre-existing condition which appears to be effecting the disability period.
> 4. Requests from outside sources for authorization to perform surgery, dental work, or to have a claimant examined at the Workers Compensation Board offices or referred to the Manitoba Rehabilitation Hospital.
> 5. Claims where a request is received from another Workers Compensation Board for a medical summary or medical evaluation.
> 6. Claims where a worker's admission to hospital for elective surgery is delayed and as a result the claimant is receiving temporary total disability benefits.
> 7. Hernia claims where an injured worker's time loss is more than one week before surgery or beyond eight weeks after surgery.
> 8. Claims resulting in a time loss of 12 weeks or more should be discussed between a Medical Officer/Chiropractic Consultant, an Assistant Director of Rehabilitation, and a Claims Officer, to ensure that the claimant is receiving adequate treatment and to establish a form of treatment control.
> 9. Claims where the claim was initially accepted and the injured claimant experiences a recurrence of signs or symptoms of a similar nature. (The Claims Officer is to obtain a medical opinion before making a decision as to the relationship between the recurrent signs and symptoms and the initial claim).
> 10. Requests by injured workers to change doctors when the worker is dissatisfied with the care or treatment and where the worker has already changed doctors once.
> 11. All situations where the attending practitioner has not submitted a report, despite two requests.
>
> **II. REFERRAL BY THE CLAIMS OR REHABILITATION DEPARTMENTS**
>
> Where an adjudicator or counsellor wishes medical authorization to have a claimant examined under the following circumstances:
>
> 1. To determine if the claimant has any remaining impairment as a result of the compensable condition.
> 2. To determine the extent of impairment if there are medical reports on file which appear to be conflicting in nature relative to the impairment.
> 3. Where a time loss appears to be extended and this is not supported by medical evidence.
> 4. To determine by the adjudication process the need for referral to the Manitoba Rehabilitation Hospital or any other treatment.
> 5. Consultation for referral by a Vocational Rehabilitation Counsellor as necessary for work assessments and/or psychological assessments.

6. Requests by claimants to leave the province in order to determine if the claimant should be allowed to leave (the Medical Department should determine whether there is appropriate medical services available).
7. Instances where the claimant misses a medical appointment or physiotherapy appointment and the reason is not satisfactory...

IV **REFERRAL BY THE CLAIMS DEPARTMENT OR MEDICAL AID**

1. Where treatment by a chiropractor appears unusual.
2. Where a chiropractor is treating a part of the body other than was injured in the accident.
3. Where it is apparent the claimant has an underlying pathology that could be aggravated by chiropractic treatment."

Also of note is a memorandum of instruction from the Director of the Claims Department dated August 26, 1983, which states:

> Effective immediately, when ever a Claims Officer decides not to follow the advice of the Medical Department; I would like that file referred to the respective Senior Claims Officer for review.
>
> The Claims Officer should put a memorandum on file indicating the reasons for not following the advice of the Medical Department, and if the Senior Claims Officer is in agreement, the memorandum will be initialled and the Senior Claims Officer's agreement will be noted on the memo.
>
> If the Senior Claims Officer is not in agreement, a memorandum is to be placed on the file stating the decision of the Senior Claims Officer. As well, I would like the Senior Claims Officer to discuss the decision with the Claims Officer involved.

Taken together, these two directives demonstrate that claims adjudicators are **expected** to seek the opinions of Medical Officers and **discouraged** from not complying with those opinions. Given this background, it is apparent to us that despite the Manitoba Workers Compensation Board's statements to the contrary, **Medical Officers are de facto adjudicators.**

In order to determine the extent to which these policies are put into practice by claims adjudicators, we examined periodic surveys, done by the Claims Department, to count the number of files referred by Claims Officers and Claims Processors to Medical Officers. For a one- or two-week period, adjudicators were asked to count the number of files which they either discussed with Medical Officers, or referred to Medical Officers in writing.

In May 1984, when the first survey was done, 210 files were referred in a one-week period. This number increased steadily, peaking in June 1985, with 408 referrals in the week surveyed. In September 1985, there was an insignificant decrease, to 406 files referred. Since that time, the number of files referred has continued to decrease. In September 1986 (the last survey results available at the time of writing), there were 304 files referred to Medical Officers in the week surveyed.

It would be useful to compare this number to the actual number of claims open in the Claims Department on a given date. However, the Workers Compensation Board was unable to provide us with this information as they do not know how many claims are open on a specific date.

In summary, the data which is available, combined with our collective experiences with the Manitoba Workers Compensation Board and the testimony of many injured workers at our public hearings, have led us to conclude that Medical Officers play a substantial role in claims adjudication, both in establishing the work relatedness of an illness or injury and in establishing continued eligibility for benefits. We do not believe that this is an appropriate role for doctors employed by the Workers Compensation Board. Workers' compensation, if it is to be successful and accepted in the community, must be a self-policing system which relies primarily on the information submitted by workers, employers and community doctors. That information should be questioned by the Workers Compensation Board only in exceptional circumstances, and not routinely as is now the case.

D. Rehabilitation Department

Under the current compensation system, injured workers who are "totally disabled" receive temporary total disability benefits and are clients of the Claims Department. Once an injured worker has been deemed fit to return to suitable employment, s/he **may** become a recipient of rehabilitation benefits and a client of the Vocational Rehabilitation Services Department. Because of this division of responsibilities, the relationship between the Claims and Rehabilitation Departments is complex. Claimants may be totally disabled for one day or many years. During this time, since they are still classified as totally disabled and their benefits are therefore paid by the Claims Department, the Rehabilitation Department does not become involved with them. Despite public statements by officers of the Board about the value of "early intervention" by rehabilitation specialists, such intervention does not often occur within the Manitoba Workers Compensation Board. Until the claimant is the **financial** responsibility of the Rehabilitation Department, that Department does not become involved with the claimant, except in exceptional circumstances, such as accidents resulting in paraplegia or quadraplegia. However, once a claimant is determined to be "fit for suitable employment" or "fit to work with (permanent or temporary) restrictions," s/he may then become a client of the Rehabilitation Department. A claimant may go through this process of being deemed first totally disabled, then fit for suitable work (and therefore a Rehabilitation Department client), and then totally disabled (and therefore a Claims Department client), one or many times. For many of the injured workers who appeared at our public hearings, this was a revolving door leading to nowhere.

The process of transferring claims from the Claims Department to the Rehabilitation Department has generated some controversy over the years. Until 1983, it was the practice of the Claims Department to simply send claimants a letter terminating benefits, effective the date that they were no longer considered to be "totally disabled," without making any reference to the fact that they might receive benefits from the Rehabilitation Department. Some time later, the claimant might receive a letter from the Rehabilitation Department, stating that s/he was eligible for benefits from that Department. Understandably, this caused a lot of unnecessary anxiety amongst injured workers. The current practice is for the Claims Department to send a letter to claimants deemed fit to return to suitable work, who also have some permanent or temporary restrictions, advising them that their benefits will be continued pending review of their claim by the Rehabilitation Department. **This practice is a definite improvement over the earlier one. However, we are concerned about the long delays currently involved in this transfer process. Senior staff of the Workers Compensation Board have advised us that it currently takes approximately six weeks for this transfer to occur. As well as further impeding the rehabilitation process, these delays inflate the "average days lost" statistic published by the Board, since claimants, during this waiting period, are on temporary total disability benefits.**

The "revolving door" referred to earlier was a common theme at our public hearings. It doesn't make sense to injured workers; and, as a Committee, we are unanimous in our belief that the current system of transferring responsibility for a claimant back and forth between these two departments is not in the best interest of injured workers or employers.

The other point of contact between the Claims and Rehabilitation Departments occurs when staff of the Rehabilitation Department sends a claim back to the Claims Department for re-adjudication. During 1986, this resulted in the termination of benefits for 101 claimants. Such action must be initiated by the Rehabilitation Department, and may also involve the Board's Medical Officers who may determine that restrictions are no longer necessary and that the claimant is capable of performing his/her regular duties, or that the claimant's continuing problems are the result of a pre-existing condition, "not aggravated or enhanced by the compensable injury." In the cases of the 101 claimants noted above, this occurred while they were in an active program with the Rehabilitation Department. Several injured workers who appeared at public hearings, stated that this had happened to them part way through their Board-sponsored training programs which they were then required to abandon. It has been suggested to us by some injured workers, as well as by some advocates and some current and former staff of the Rehabilitation Department, that sending a file back to the Claims Department may be done intentionally, in some cases, to provide grounds for the termination of benefits of "troublesome" Rehabilitation Department claimants. **Whatever the reasons for the practice, we believe that such treatment of injured workers is neither appropriate nor acceptable.**

Finally, we will comment on the feelings which exist between these two departments, which (although it may not be obvious to those outside of the Workers Compensation Board), nonetheless have a significant effect on the way the Board is run. **There is little mutual respect between the staffs of these departments.** Claims Officers resent the fact that Rehabilitation Counsellors have smaller caseloads than Claims Officers. Additionally, Rehabilitation Counsellors have more flexibility in their working day and get paid more than Claims Officers. For their part, Rehabilitation Counsellors feel that their job is more difficult. Firstly, Rehabilitation Counsellors are often the first to contact an injured worker in person, and they feel that they face the brunt of injured workers' anger with the system—most of which stems from their prior dealings with the Claims Department. Secondly, Rehabilitation Counsellors believe that their job is more difficult because they must handle the transition from benefits by entitlement (temporary total disability) to the discretionary benefits provided by the Rehabilitation Department.

This simmering resentment and mutual lack of respect must be dealt with if high quality service is to be provided to injured workers.

RECOMMENDATIONS

23. **The Finance Department should be a service department and not a line department. Staff of the Finance Department should not, therefore, have any adjudicative responsibilities. Decisions regarding the calculation of average earnings and the issuing of benefit cheques should be made by the adjudicator responsible for the claim.**

24. **The Medical Aid Department should be disbanded. The service functions—paying of physicians's bills, etc.,— should be the responsibility of the Finance Department. Any adjudicative decisions regarding entitlement to benefits (such as prostheses, prescription drugs, aids to independent living, etc.), should be made by the adjudicator responsible for the claim.** We do not mean to suggest that, for example, each time a prescription bill is submitted, a decision should be made, to pay or not to pay, by a claims adjudicator. The initial decision to pay is an adjudicative one. When subsequent bills for the same prescription are submitted, they should simply be paid by the Finance Department.

25. **The role of Medical Officers should change. They should cease active involvement in claims adjudication. We recognize that this will also necessitate major changes in the Claims Department. However, we believe that these changes are needed.**

    Workers' compensation, in order to be successful, and accepted in the community, must be a self-policing system which relies primarily on the information submitted by workers, employers and community doctors. The Workers Compensation Board should, therefore, rely primarily on the information submitted by treating physicians and surgeons. In those exceptional circumstances where the claims adjudicator believes that a second opinion is necessary, a referral should be made, through the family doctor, to an appropriate medical specialist external to the Board.

26. **The existing Claims and Rehabilitation Departments should merge into one Client Services Department. Our detailed recommendations for the mandate and operations of an integrated Client Services Department follow later in Chapter 13.**

6. Access to Information

Many of those who appeared at public hearings complained about the difficulty of obtaining information from the Workers Compensation Board. This complaint was expressed by all of the major groups which appeared at those hearings—injured workers, trade unions and employers. In this regard, the Workers Compensation Board seems to treat all interested parties similarly. We will comment on access to three types of information: individual files, policy statements, and statistical information.

A. Individual Files

In the past, access to the information contained in an injured worker's file had been a contentious issue. In 1983, *The Workers Compensation Act* was amended to give injured workers complete access to their files, including medical reports, with the exception of medical reports submitted by external physicians and surgeons prior to September 15, 1983. In order to gain access to those reports, the claimant must request them in writing from the doctor involved. The Board's Review Officer will assist with this. If consent is given by the doctor in question, then the report(s) will be released to the claimant. If consent is refused, or if the doctor is unavailable, then the claimant may appeal to an external appeal body for consideration. Originally, this was done by the Complaints Committee of the College of Physicians and Surgeons. At that committee's request, this procedure was changed. Currently, these appeals are heard by The Medical Access Committee, a committee of two doctors appointed by the Minister responsible for Workers Compensation. From the perspective of injured workers and their representatives, this system appears to be working well. Employers are dissatisfied with the current legal framework, however. Many employers expressed their strong view that it was their right to have access to the claimants entire file, in order to properly prepare for an appeal. **We believe that the current right of access should not be broadened to include employers. As noted elsewhere in this Report, we are concerned that such involvement by employers is making an inquiry system into an adversarial one. We believe that the worker's right to confidentiality; regarding his/her medical treatment should, in an inquiry system, take precedence over any competing right to that information by employers. Employers should, however, be provided by the Board with a comprehensive statement as to the restrictions placed on the injured worker as a result of the work injury. As well as outlining the physical restrictions, such a statement should inform employers about the specific situations which should be avoided in order to prevent a worsening of the worker's condition or a recurrence of injury.**

Current Board policy (Board Order 140/84) releases individual files only to assist the injured worker in appealing a decision. We consider this unnecessarily restrictive. **Injured workers should have full access to their files at any time—not only when they wish to formally appeal a decision.**

It has also been brought to our attention by the Manitoba Federation of Labour, that in some cases not all of the material related to a particular claim will be kept physically with the file. This is the case when an appeal reaches the Board of Commissioners. Any written submissions made to the Board for the final appeal are filed separately, in the Administrative Offices of the Board. If, therefore, future appeals were to be made, the claimant, and his/her representative, would not have access to the complete file and would likely not even know that material was missing from the file. **It is our recommendation that this practice cease. All documents related to a claim should be filed together to ensure easy and complete access.**

Lastly, on this topic, Board Order 141/84 specifies that only one copy of the file will be made available to the Claimant or his/her representative. We consider this to be unnecessarily restrictive. **Extra copies of the file should be made available to the claimant if needed.**

B. Policies and Procedures

Currently, the only public statements of Workers Compensation Board policies and procedures are:

1. The Rehabilitation Department Procedure Manual. (The Rehabilitation Department's Training Manual, which is much more detailed, is not a public document.)
2. The Medical Aid Department Manual.
3. The public version of the minutes of The Board of Commissioners.

This is, in our view, unnecessarily restrictive. When the current Board of Commissioners took office in July 1982, public access to information was an important part of its mandate. **Initially, some progress was made, and the above-mentioned documents became publicly available for the first time.** After an initial period of increased openness, however, the Workers Compensation Board has withdrawn into a closed state.

Perhaps the best way to explain our concerns in this area is to relate some of our own difficulties in gaining access to information, documents and policy statements, from the Workers Compensation Board.

On January 27, 1986, Mr. King wrote to the Chairperson of the Manitoba Workers Compensation Board, requesting, in part, "all policies and guidelines utilized in the adjudication of benefits and the determination of level of benefits." We did not receive a response from the Board of Commissioners until April 4, 1986, at which time we were provided with the above noted publicly available documents.

Our Committee was assured by the Minister responsible for Workers Compensation (then the Honourable Gerard Lecuyer), and by the Chairperson of the Board, that it was their intention to cooperate fully with our Committee. Such cooperation, however, was absent as we continued to attempt to obtain from the Workers Compensation Board, a complete set of Board Orders and directives from senior management, which together comprise the policies of the Manitoba Workers Compensation Board. The Director of the Claims Department kindly provided us with a copy of her personal set of binders containing memos to staff, elaborating on published Board policy and providing direction for staff in the many areas where published policies do not exist. One member of our Committee, assisted by a number of staff members, spent several days cataloguing this material and combining it into subject order with the material provided by the Board, which arrived completely uncatalogued, in chronological order. This was later combined with additional documentation kindly provided to us by the Director of the Worker Advisor Office. **Even now, we are not certain that we have a complete set of "policies and guidelines utilized in the adjudication of eligibility and the determination of levels of benefits" as we requested in our letter of January 1986. Particularly disturbing to us is the fact that at each step along the way, we were assured by the Chairperson that:**

- **a) the Board would cooperate with our Committee, and**
- **b) we already had all of the available information.**

We have, therefore, come to the conclusion that the Board of Commissioners may be unaware of the bulk of written material used by adjudicators on a daily basis. We understand that rectifying this may be a difficult task, due to the *ad hoc* manner in which policy has historically been developed. Difficult though the task may be, we believe it should have been attempted.

Given these experiences then, we sympathize entirely with the injured workers, unions and employers, who complained that they could not even find out what rules the system uses to adjudicate a claim or to decide an appeal. Even the Director of the Worker Advisor Office was unable to obtain any information not publicly available.

Frequently, simple requests for information from interested parties appear to be denied. The Manitoba Federation of Labour, for example, requested copies of all new, Board Orders as they were passed. These are word-processed onto individual sheets, 8 1/2 inches by 11 inches with a title, and circulated to staff. The Manitoba Federation of Labour was advised by the Chairperson, that their request could not be met and that Board Orders would have to be extracted from the minutes, by the staff of Manitoba Federation of Labour. This would require reading summaries of all the cases discussed by the Board, to locate any policy statements and to retype them, since Board minutes are produced sideways on paper, 8 1/2 inches by 14 inches. It required the intervention of the Minister responsible for Workers Compensation, to have one copy of documents (already prepared for staff use) sent monthly to the Manitoba Federation of Labour.

The refusal of the Workers Compensation Board to make easily accessible one of the few documents which they have agreed to make publicly available is an example of the defensive attitude which appears to have taken hold there.

Recently, we have noted that less information is contained in the minutes of the Board of Commissioners. Until January 1987, we believed, along with all other interested readers of the Board minutes, that the business of the Board was reflected in the minutes. In January 1987, however, we were concerned to learn that certain motions were not recorded in the minutes, but rather, reference was made to a motion passed by the Board "Executive." For example, the January 21, 1987 minutes contained the following motion:

> ...that the policy on complaint proceedings before the College of Physicians and Surgeons relative to Workers' Compensation Board Medical Officers be adopted as approved at the January 19, 1987 Executive Meeting.

The minutes of the "Executive" were not appended, and so the reader is left with the knowledge that something has happened, but knows not what. **This practice is not acceptable. All business of the Board should be fully reflected in the minutes.**

Seventeen months after commencing our review, we learned of the existence of an "Executive" of the Board—a body to which no prior referrence had been made. We also learned that the "Executive" is, in reality, the entire Board, meeting in camera. Having perused the minutes of the Board Executive from September 8, 1986 to February 16, 1987, we have concluded that The Board of Commissioners has determined that numberous items—which we consider to be of public concern—were discussed only at Executive meetings and not reflected in the public minutes of the Board. At the same time, the Board, in its Executive meetings appeared to be unnecessarily occupied by administrative details which should be the responsibility of senior management. Examples of items which, we believe, ought to have been included in public Board minutes are:

> 1) "The Chief Executive Officer also submitted a proposed format for future financial reporting to the board and the Board agreed that this would be implemented for the end of September, 1986." (Sept. 22, 1986)
>
> 2) "In this memo The Director of Assessments recommended that the balance on which accounts are penalized and which will be written off at year-end, be increased from the present plus or minus $.99 to plus or minus $9.99. The Board concurred with this recommendation."
>
> 3) "The Board acknowledged receipt of a report for the month of August, 1986, from Dr. Tennenbein regarding his activities which included evaluation of three claimants for lead poisoning."
>
> 4) "The Board noted problems have arisen concerning the role of the Chiropractic Consultants and it was suggested that the Director of Medical Services should prepare a report outlining the specific role of Workers Compensation Board Chiropractors as well as the role of Medical Officers....Once a final paper on the role of Medical Officers is completed by the Director of Medical Services, it is to be reviewed by the legal counsel as well as the College of Physicians and Surgeons." (October 14, 1986).
>
> 5) "The Chief Executive Officer referred to a memo from The Director of Finance which referred to the Board's practice of treating the self-assured classes as each having their own "funds" and, therefore, responsible for all the costs incurred on claims from their employees....The Board discussed this matter and was of the opinion that in cases where costs are incurred due to an adjudicative error, these costs should be charged to administration and a separate account code should be created for the category of "self assurer errors." The board noted that these costs would subsequently be charged back to self-assurers and, in reality, would not increase administration costs."
>
> (November 3, 1986)

> 6) "The Board discussed with the Director of Data Processing the reporting of rehabilitation payment statistics.
>
> The Director of Data Processing mentioned that in the past, the statistics had referred to settled accidents and could, therefore, include claims which had been in pay for several years, but settled in any one particular year.
>
> It was mentioned that in the past, when reporting statistics on days of time loss, this had included periods of time the claimants were off work and on rehabilitation, wage loss and TTD.
>
> As of January 1, 1987, Data Processing would be able to separate the rehabilitation time loss from the claims time loss. The period of time the claimant was paid wage loss compensation would not be included in the statistics. The Director of Data Processing stated they cannot provide a breakdown of this type of statistic for any claims prior to 1985.
>
> It was agreed that the 1986 Annual Report would not include the breakdown between rehabilitation days lost, and claims time loss days lost. These would be internal reports prepared to indicate the amount of days TTD paid for the two departments." (November 24, 1986)

It is necessary, on occasion, for the Board to hold discussions in camera. However, once the discussion has finished and the Board has reached a decision, that decision should be reflected in the minutes. We feel that not doing so is an example of the Board's failure to take a public position and to allow that position to stand the test of scrutiny by those concerned with the workers' compensation system.

C. Statistical Information

As noted in Chapter 2, we found that the ability of our Committee to do a thorough job of evaluating the current practices of the Manitoba Workers Compensation Board was hampered by the relatively small amount of statistical information which was available to us. We are aware that when the current Board of Commissioners took office in 1982, virtually no such information existed. The current Board is to be commended for its efforts, to date. However, much remains to be done.

Statistics which answer the basic questions of how people get hurt, and what happens to them once they are hurt are necessary for the Board and for interested parties, such as labour and management, in order to evaluate and to improve workers' compensation in Manitoba; as well, such statistics (by identifying hazardous workplaces, work processes and occupations) can help to prevent occupational illnesses and injuries, thereby reducing the associated human and financial costs. **We believe, therefore, that such statistical work should be undertaken as a high priority by the Board of Commissioners.**

We recommend that the Board establish a management information system which would provide to the Board and other interested parties, the information necessary to evaluate the workers' compensation system in Manitoba.

We also recommend that such a management information system be compatible with those recommendations of the *Federal Provincial Advisory Committee on Environmental and Occupational Health*, applicable to workers' compensation. These recommendations are:

a) that all Workers Compensation Boards use a standard variant of the International classification of Diseases in order to code "occupational injuries and disease" which should include poisonings;

b) that all Workers Compensation Boards code "industry" and "occupation" according to the requirements of the National Work and Injury Statistics Program;

c) that the "source of injury" 216.2 code currently used by the Workers Compensation Boards be refined to allow greater specificity concerning the work hazard and exposure that caused the occupational disease;

d) that validated claims statistics be published annually giving accepted claims by the International Classification of Diseases code and occupation, by the International Classification of Diseases code and industry and by International Classification of Diseases code and source of disease. The report should also indicate trends;

e) that coded data on validated claims be provided to Statistics Canada's National Work Injuries Statistics Program.

RECOMMENDATIONS

27. Injured workers should have full access to their files at any time, and not only to assist them in preparing an appeal.

28. All documents related to a claim, including material prepared for appeals before the Board of Commissioners, should be filed together to ensure easy and complete access.

29. **The Manitoba Workers Compensation Board should make available to interested parties, all policies and guidelines used in the adjudication of claims.**

30. **All decisions of the Board of Commissioners should be reflected in the public minutes of the Board.**

31. **That a priority for the Manitoba Workers Compensation Board be the establishment of a management information system. Such a system should provide the Board of Commissioners, senior staff and other interested parties (such as government, labour and management) with the information necessary to evaluate the workers' compensation system in Manitoba.**

32. **That such a management information system be compatible with those recommendations of the Federal Provincial Advisory Committee on Environmental and Occupational Health, applicable to Workers Compensation.**

III. ADJUDICATIVE ISSUES

In this Report, we have attempted to outline our major concerns with the current system of workers compensation in Manitoba and to outline our proposals for change. We have not attempted a detailed review of every Board policy, or every internal memorandum. Hopefully, this will be undertaken by the Workers Compensation Board in the context of our recommendations for a more open, self-policing, inquiry model of workers' compensation. Because of our experiences during the course of this review, there are a number of issues of adjudicative policy which we have chosen to comment upon in detail.

It is understood by most administrators that the law takes precedence over any policy or procedure instituted by the administration. Thus, if the law requires the agency to pay $10 for a certain condition, the agency must pay $10, rather than $8 or $12, even though valid arguements exist as to why the latter two figures may be as reasonable, or more reasonable, than the one outlined in law. Within the legal requirement that the Workers Compensation Board compensates workers for conditions "arising out of and in the course of employment," much has traditionally been left to the discretion of the Board of Commissioners. *The Workers Compensation Act of Manitoba* contains such clauses:

> **General jurisdiction.**
>
> **51(1)** The board has exclusive jurisdiction to examine into, hear, and determine, all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority, or discretion, is conferred upon the board; and the action or decision of the board thereon is final and conclusive and is not open to question or review in any court; and no proceedings by or before the board shall be restrained by injuction, prohibition, or other process or proceeding in any court, or are removable by cetioriari or otherwise into any court.
>
> **Particular jurisdiction.**
>
> **51(2)** Without hereby limiting the generality of subsection (1), it is declared that the exclusive jurisdiction of the board extends to determining
>
> (a) whether any injury or death in respect of which compensation is claimed was caused by an accident within the meaning of the Part;
>
> (b) the question whether any injury has arisen out of or in the course on an employment within the scope of the Part;
>
> (c) the existence and degree of disability by reason of any injury;
>
> (d) the permanence of disability by reason on any injury;
>
> (e) the degree of diminution of earning capacity by reason of any injury;
>
> (f) the amount of average earnings;
>
> (g) the existence, for the purpose of the Part, of the relationship of any member of the family of a workman as defined by this Act;
>
> (h) the existence of dependency;
>
> (i) whether or not any industry or any part, branch, or department, of any industry is within the scope of this Part, and the class to which any industry or any part, branch, or department, of any industry with the scope of this Part should be assigned;
>
> (j) whether or not any workman in any industry is within the scope of this Part and entitled to compensation thereunder;
>
> (k) whether any particular disease is peculiar to, or characteristic of, any particular industrial process, trade, or occupation, to which the Part applies;
>
> (l) that a person who is not otherwise a workman for the purposes of this Act shall be deemed to be a workman for the purposes of this Part and, where the person is not under the contract of service or apprenticeship

> (i) that another person shall be deemed to be his employer, and
>
> (ii) What his earnings shall be deemed to be, for the purposes of this Part.
>
> **Review by board.**
>
> **51(3)** Nothing in subsection (1) prevents the board from reconsidering from time to time any matter that has been dealt with by it or from rescinding, altering, or amending, any decision or order previously made, or making any further or supplementary order, all of which the board may do.

Several of the issues which follow—pre-existing conditions, occupational diseases, and rules of presumption—are discussed in more detail in the appendices to this Report, and we refer interested readers to them.

1. Pre-existing Conditions

Majority Opinion (King and Donner)

Workers bring to their employers all of their strengths and talents to get the job done; as well, they bring to their employment all of their weaknesses. **One of the first general rules in workers' compensation is that the employer accepts the worker as he/she is, as should the compensation system.** Thus, if an internal weakness of the worker results in a greater disability than might have otherwise been expected following a work injury; or a longer period of time off work than might have been expected; or indeed, an injury where one might not have been expected, the condition is still compensable. **Once accepted as having a compensable condition, workers have the right to expect the compensation system to return them to their pre-injury condition, or if unable to do so, to compensate them for the loss.**

This seems, on the surface, to be a relatively simple concept; in practice it is devilishly difficult to administer. We were placed in the difficult position, during public hearings, of being in a transition between an old policy on pre-existing conditions, and a new policy or "clarification" of the old policy on pre-existing conditions. Thus, much of the testimony we heard, involved cases which were adjudicated under a 1972 policy, the clarification coming with a Board Directive of January 1986. This clarification of Board Policy contains, in part, the following statements:

> ...before any determination by the adjudicator takes place as to ongoing Workers Compensation Board responsibility, all necessary medical documentation and/or other information should be solicited.
>
> a) If that information establishes the claimant has recovered from the compensable injury, has returned to the pre-accident state, and is capable of performing the pre-accident employment, the Workers Compensation Board responsibility is considered to have been temporary.
>
> b) If the information reveals objective medical findings due to either the pre-existing condition or accident injuries to warrant disability, compensation will continue.
>
> c) When the objective medical findings are inconclusive as to the claimant's ability to return to work, and the other relevant data supports the position that either the pre-existing or compensable condition continues to prevent the return to work, payment of compensation will continue.

These statements of Board policy, if adjudicated as written, would not have led to the number and variety of complaints we received in public hearings. However, as earlier stated, we are aware that the Board was in the midst of a transition between old and new policy.

We would like to share some examples of how a compensation board's adjudication of pre-existing conditions can affect the lives of individuals. One worker, a driver by profession, came to the public hearings following optimal recovery from a spinal fusion in the cervical region. Prior to a motor vehicle accident in the course of employment, this worker had known of no neck problems, had sought no medical attention for his neck, and had lost no time from work for complaints of neck pain. Following work injury, the spinal fusion had to be performed. Unknown to himself, this worker suffered from a pre-existing condition—narrowing of the spinal column. A totally healthy worker may not have required surgery for such an injury, but this worker did. The man came to the public hearings because his compensation benefits had recently been terminated, because the Workers Compensation Board had determined that all of his continuing problems were the result of his pre-existing spinal stenosis. Athough there was no question as to his inability to drive (he could not move his neck far enough to check side lanes), he had been offered no rehabilitation assistance in seeking alternate employment, and was not able to find alternate employment. We understand from information provided subsequent to the public hearings that this worker was successful in winning an appeal and had been placed back on compensation benefits. His experience, however, illustrates how pre-existing conditions can interfere in compensation adjudication.

Many workers came to the public hearings and outlined cases similar to the one following. The presenter, who had worked for a company for over 12 years, had injured his back moving heavy boxes. Prior to injury, the worker had lost no time due to back complaints and had taken no medication for complaints of back pain. After many months on workers' compensation, the back condition showed no improvement. The worker was finally terminated from workers' compensation, his problems attributed to a "pre-existing condition."

Two other examples will complete our outline of some of the situations reported to us at the public hearings. In one case a worker had an injury which led to a cast being put on his ankle. After recovery and return to work, difficulties with the ankle continued. When he attempted to claim further compensation, the worker was informed that obesity was the sole cause of the continuing ankle problems. In another case, a worker injured her back and had continuing complaints of back pain. Her benefits were terminated several months later when pregnancy was cited as the cause of her ongoing back pain. As indicated earlier, some of these claims may have been adjudicated under old policy and some under the new policy.

In addition to the above-noted examples of work **injuries**, we are concerned with the handling of pre-existing conditions, in adjudicating claims for occupational **diseases**. Although we were presented with fewer case histories, we are concerned that the Board may be denying claims for respiratory disease where the claimant has a history of smoking; and for cardivascular disease where the claimant has any of the risk factors (hypertension, obesity, smoking); and for dermatitis where the worker has a prior non-related skin disorder.

Let us be clear that we are not suggesting that workers' compensation accept every claim and pay every claim, no matter what the circumstances. If, for instance, the time had come for a worker to die a natural death, merely because death happened at work rather than at home does not make it compensable. Similarly, if a worker returns to his or her pre-injury state following work injury and a time on compensation, the responsibility for the worker ceases.

You will find, if you review the discussion paper on pre-existing conditions, in the Appendix to this report, two distinctive categories of pre-existing conditions: static conditions and the deteriorating conditions. Static **pre-existing conditions involve some inherent limitation, weakness or vulnerability, which renders the effects of an industrial accident more severe than might have been expected. Deteriorating pre-existing conditions have already become, or are on the verge of becoming, actively disabling.**

The former type, i.e. static conditions, are usually easier to adjudicate. Although there was a condition, the worker may not have known about it, and it did not effect the employment of the worker in any way. The usual handling of such claims should be to accept full responsibility. Deteriorating pre-existing conditions may either fully recover to pre-injury state, at which time there is no further compensation board responsibility, or result in permanent aggravation. This latter category can be among the more difficult to adjudicate.

We have previously stated that we believe the employer and the compensation system must accept the worker as they find him or her, and return the worker to his/her pre-injury condition or compensate for the loss. In terms of recommendations, the following are the views of Mr. King and Ms. Donner (after which Mr. Farrell's dissent follows):

1. **The principle to be followed in adjudicating pre-existing condition claims, is that the workers' compensation system is obligated to return the injured worker to his/her pre-injury condition, or to provide fair compensation for the reduced health and/or financial status, if unable to do so. The Workers Compensation Board should accept its claimants as they are, whatever their attributes: thin or fat, tall or short, male or female, pregnant or not.**

2. ***The Workers Compensation Act* should be amended to state that a claimant who has a static pre-existing condition should not lose entitlement to compensation, nor receive reduced benefits or benefits for a shorter duration of time, than claimants without any such condition.**

3. **The adjudication of occupational disease claims should not differ from the adjudication of claims for occupational injuries, that is attributes of the claimant should not be used as reasons to terminate or reduce benefits.**

4. **In the case of deteriorating pre-existing conditions, workers' compensation should cover temporary aggravation, permanent aggravation, and enhancement of the condition caused by work injury. As in all our other recommendations, the medical assessment necessary in such cases should be done by appropriate specialists, external to the Workers Compensation Board.**

Dissenting Opinion of the Industry Representative

The relationship of a "pre-existing condition" to a particlular injury or illness has been an adjudicative problem for Workers Compensation Boards for years, but did not become a major "political" issue until the late 1960s. Attempts to address specific problems in the various Compensation Acts have led to far broader acceptance of a wide range of conditions as being compensable on the basis of "probability." This thrust has taken Workers Compensation coverage into areas where the causal relationship between job and condition cannot be supported medically.

During public hearings, a number of the workers who appeared were suffering the effects of a condition which they linked to their work, because the first symptoms of this condition occurred while they were working; and they believe the responsibility for the condition rests with the Board, in spite of the medical opinion to the contrary. Workers Compensation administrators have adopted policies in recent years that have strayed from medical fact and into the area of social need, based on the belief that Workers Compensation is the best vehicle to address such needs.

Workers Compensation is one of the first pieces of social legislation adopted in most Canadian provinces including Manitoba, but it now forms only a part of a broad scheme of public and private programs to reduce the impact of illness or disability on working individuals in our society. Workers' compensation in Manitoba must be recognized as being responsible **to provide fair compensation and rehabilitation benefits to workers while their earning ability is impaired, as the result of injuries or illness directly related to their work environment.**

The Employers Taskforce expressed concern that Workers Compensation has strayed far from its original mandate and now appears to be a tool to address broader social issues, without increasing the burden on the provincial treasury. The protection of the income of that segment of society which is employed, from the negative impact of all injuries and illness, cannot rest solely with employers.

In 1982 the wording of section 4(5) of *The Manitoba Workers Compensation Act* was changed to provide for "conclusive presumption." This has resulted in the acceptance of a number of claims that were awarded solely on the basis of an unproven causal relationship to employment. Many of these awards have no basis in medical fact, but are supported solely by "presumption." In simple terms, this is being interpreted in some circles as meaning "if you work and develop some infirmity, then work is the cause."

Spinal conditions are good examples of this lack of causal relationship. Normal living activity will trigger the onset of certain conditions, but should this occur in the workplace, compensation is paid. There is every reason to believe that the disability would have developed had the individual never worked, yet because the person is employed, s/he is compensated. This leads one to conclude that work is either unnatural or, in some way, abnormal behaviour. In fact, though, current opinion is that work is not only necessary, but it is important to the development of human potential.

As employers and other groups in society began to question the cost of these policies, the Workers Compensation Board increased the use the Second Injury Fund to pay such claims. This resulted in a redirection of the cost allocation, from a particular employer's assessment group to the total assessment base. I believe that this action is merely an attempt to sidestep the issue of whether or not such claims should be paid by workers' compensation. The government chose to change legislation to permit the Workers Compensation Board to pay such claims, and I accept that government has that right; but I must also state that government should not expect only one segment of society to bear costs that should be the responsibility of society in general. Therefore, the Second Injury Fund or some similar method must be funded by the **government** from the provincial tax base.

Pre-existing conditions and illnesses that occur in the workplace are going to continue to be issues that will cause problems for Compensation Boards, and dissention between labour and industry, long after whatever actions arising out this Report have been implemented. It is time for all parties—government, labour and business—to seriously examine this issue and determine the feasibility of some acceptable form of disability income protection.

Majority Recommendations [33 through 36: King and Donner]

33. **The principle to be followed in the adjudication of cases involving pre-existing conditions is that the Workers Compensation Board is obligated to return the injured worker to his/her pre-injury condition or to provide fair compensation for the reduced health and/or financial status of the injured worker. The physical attributes of the injured worker, such as weight, height, gender and pregnancy, should not affect claims adjudication.**

34. ***The Workers Compensation Act* should be amended to state that claimants with static pre-existing conditions should not lose entitlement to compensation or receive reduced benefits,**

or receive benefits for a shortened period of time.

35. ***The Workers Compensation Act* should be amended to state that in cases of deteriorating pre-existing conditions, compensation benefits should be paid for the period of temporary aggravation and for any permanent aggravation or enhancement resulting from the compensable injury.**

36. **The adjudication of claims for occupational diseases should follow the same principles noted above, i.e. that attributes of the claimant should not be considered as reasons to refuse, reduce or terminate benefits.**

Minority Recommendations [34 through 39: Farrell]

37. **That *The Workers Compensation Act* be amended to require the Board to establish a causal relationship that can be medically supported between the injury/illness and the worker's job.**

38. **That the wording of section 4(5) of *The Workers Compensation Act* be amended to permit the Board to use medically-accepted criteria in determining presumption.**

39. **That *The Workers Compensation Act* be amended to require the costs related to the operation of the Second Injury Fund to be assessed to the Manitoba Health Services Commission.**

2. "Arising Out Of, And In The Course Of Employment" – The Rule of Presumption

The Workers Compensation Act has a presumptive clause (see Discussion Paper in the Appendix) which places the burden on the Workers Compensation Board to prove a condition was not caused by the employment if it occurred during the course of the employment. Such a presumption does not mean that the Board must accept every claim for compensation, merely because the injury occurred while at work. It does mean, however, that the burden of proof is on the Workers Compensation Board to show otherwise if it is to reject a claim.

We believe that the Workers Compensation Board sometimes reverses this onus and requires the worker to prove that an injury is work-related. Such a practice has no place in an inquiry compensation system, where the onus is clearly on the Board to search out and provide rebuttal, if one exists, to the presumption.

This practice is illustrated by the following excerpt from a letter to an injured worker: **"We have not accepted your claim because the evidence does not prove that the disabling condition was the result of your employment."**

One of the arguments we have seen adjudicators use in denying a claim for compensation (in several documents submitted to us at the public hearings), is that there was no "incident" at work which led to the worker becoming disabled. We wish to point out that there is no requirement for an incident to occur at work, for a claim to be accepted as "arising out of and in the course of employment."

RECOMMENDATIONS

40. **That adjudicative guidelines be published by the Workers Compensation Board, outlining the meaning of the rule of presumption.**

41. **That these guidelines include the following:**
    a) **That the onus is on the Workers Compensation Board to disprove a claim, not on the claimant to prove it.**
    b) **That no "incident" is required for a claim to be compensable.**

3. Captive Employees

Captive employees are usually those who, because of the geographical location or lack of alternate living accommodations, are required to: live in premises provided by the employer, eat in quarters provided by the employer, seek recreation in facilities provided by the employer, etc. The most common instance of the captive employee occurs in isolated mining or construction sites.

At first glance, it does not seem to fall on the employer to be responsible for injuries occurring to workers while they are off work (e.g., if a worker falls on the bunkhouse steps, slips while playing table tennis in a company recreation hall, or falls off a chair while in the dining hall). Rules have evolved, however, which recognize that isolated employees have no other options than to use the facilities provided by the employer. There is no hotel or boarding house close enough at hand to use. There is no hockey rink or movie theater to go to except what is provided by the employer. And there is no option but to eat in the company dining hall. These facilites are all provided to the worker by the employer and are in the control of the employer.

The Workers Compensation Board has recently provided guidelines to outline its position on captive employees. We quote from two areas of coverage (or lack of coverage):

Workers living at the campsite will be covered for injuries that occur as a result of prudent and reasonable use of the living facility, and if the injury is a result of a hazard of the facility.

If the worker caused the accident/injury, the claim would not be compensable.

With all due respect to the Board, an element of worker fault has entered into a no-fault compensation plan by including adjectives like "prudent" and "reasonable" to describe worker actions. Such behavior is not required of a worker in a normal claim for compensation, and should not be a part of adjudication of captive employee claims. Similarly, by stating that a worker who causes his/her own injury is denied compensation, the Board is introducing alien concepts to the no-fault nature of workers' compensation.

Captive employee rules evolved as much to protect the employer as they did to protect the worker. By disallowing claims for injuries which occur in the bunkhouse, dining room, etc., the Board would be opening the matter up for an action under common law for negligence. By covering captive employees, both the worker is protected (the right to compensation) and the employer is protected (freedom from lawsuit). Adding an element of fault, such as occurs in the two examples given, erodes the no-fault principle.

We recommend that the Board revise its Captive Employee policy and remove issues of fault which are present in the policy.

RECOMMENDATION

42. **The Workers Compensation Board's policy on coverage of captive employees should be revised to reflect the no-fault principle of workers' compensation.**

4. Recurrences

The theory behind recurrences is relatively simple: if a work injury again becomes disabling after a return to work, the compensation system is responsible for the recurrence. On this matter, workers' compensation differs from some other insurance plans, which seek to arrive at a "settlement" that absolves the insurer of future liability.

We are relatively suprised by the number of complaints which we received about recurrences of injuries. It seemed, from the cases we reviewed, that the compensation system is very loath to recognize a recurrence of injury, once a worker has returned to employment.

Such a position on the part of the Board is wrong, from the point of view of both the worker and the employer. From the employer's point of view, there is a wish for workers to return to the job as soon as they are able to, following work injury. If workers do this and run into difficulties in staying at work, the employer wants to know that the compensation system will not refuse to pay benefits, once again. For if the compensation system does not accept legitimate recurrences, it will be all the more difficult for employers to promote appropriate early returns to work. From the worker's perspective, if it is felt that the compensation system will deny a recurrence, much more recovery time will be taken to make sure that the original injury has fully healed.

Ironically, being overly restrictive in the area of accepting recurrences leads to the penalizing of the worker who strives to return to work as early as possible, and rewards the worker who stays off work longer for a similar condition. Although we would not argue for a return to work too soon following work injury, we believe that a prime focus of workers' compensation should be in the area of returning workers to gainful employment, and that any impediments to this end are to be avoided.

RECOMMENDATIONS

43. **Current policy, which requires that all cases in which an injured worker claims benefits for the recurrence of a previous compensable injury be referred to a Workers Compensation Board Medical Officer, should be changed to remove the necessity of such a referral.**

44. **Adjudicative practices in claims for recurrences should be guided by the same principles outlined elsewhere in this Report.**

5. Investigations

This Committee, during the course of its activities, heard concerns from several quarters about the investigatory methods used by the Workers Compensation Board to clarify discrepancies in fact.

The Board has on staff, personnel known as Investigative Officers, whose job it is to gather information (through interviews and on-site evaluations) necessary to clarify differences in opinion, or to investigate accusations of fraud, etc. For example, if an injured worker and the employer differ regarding what was included in pre-accident job duties, an Investigative Officer might be assigned to investigate.

Other circumstances may arise in relation to a specific case, which might be addressed by the Claims Officer or Vocational Rehabilitation Counsellor without the involvement of an Investigative Officer. This may also be included under the broad term of investigation.

When we speak of investigation, we are referring to those efforts to establish facts. Techniques used might involve interviews with relevant individuals, touring a worksite or reviewing documents. Obviously, the critical feature for any investigation is that it is unbiased, i.e. that information be obtained from all parties involved and that it be weighed equally.

In our discussions with injured workers at public hearings, and in our review of selected claims files, the Committee became concerned that the Workers Compensation Board appeared to give greater weight to information provided by employers, over information provided by injured workers. This approach appears to reflect an underlying philosophy which regards the injured worker as untrustworthy. We believe it is equally easy to argue, in the abstract, that employers have vested interests which might affect the accuracy of their statements as it is to make the same argument about injured workers. However, unless there is some evidence that one or the other party is giving incomplete, inaccurate or misleading information,such assumptions are inappropriate. Furthermore, such an ideological bias damages the relationship between injured workers and the Board, leading to a perception of the relationship, by both sides, as adversarial. We are aware, from our discussions with injured workers and Board staff, that this adversarial perception currently exists and may, indeed, be strengthening.

Workers' compensation is designed as an inquiry rather than adversarial system. For it to operate efficiently and effectively, it must be able to perform its investigations without bias. The veracity of the injured worker, or of any other relevant party, must not be questioned unless there is clear and specific reason to do so. Investigations must be balanced and disinterested, with the goal of establishing facts.

We cannot provide a magic formula to ensure that investigations are balanced in their treatment of injured workers and employers. Legislation cannot guarantee that the information of injured workers is given equal weight to that of employers and other relevant parties. However, we can state that any widespread perception that it is otherwise will contribute to a deterioration of the inquiry model upon which workers' compensation is based. An investigation under the inquiry model is not intended to find the "bad guy," but to establish facts in order to allow for fair and impartial decision making.

In addition to rigorously avoiding any bias in the inquiry process, the Board must ensure that all participants are aware of the reasons for the inquiry and the purpose for which information is being requested from them. At the same time, it must also ensure that the information obtained in written form is an accurate reflection of the statements made by the individual being interviewed. In other words, the interviewer must be sure that s/he understands the interviewee and vice versa.

Our concern in this area relates to persons who might speak English as a second language, or who might possess limited literacy. The first category should be addressed by the Board, through ensuring that interpreters are made available to all injured workers speaking English as a second language in cases where the **possibility** of communication difficulties might exist. Furthermore, **we believe that it is the responsibility of the Board to make the necessary arrangements for an interpreter to be present when a statement is being taken from a person whose first language is not English, in order to ensure that no misunderstandings occur on either part.**

With regard to interviewees having limited literacy skills, the interviewer should ensure that the interviewee is accompanied by another party who is fully literate, and who can witness the statement obtained and verify its accuracy. In all cases, the interviewers should read the statement to the interviewee, in its finished form, to ensure accuracy and agreement, and should provide a copy of the statement to the interviewee upon completion.

It is the responsibility of the Workers Compensation Board to ensure that interviewees with limited or no literacy skills fully understand the investigation process and are satisfied that their statement, which will be entered into the file, accurately reflects their verbal presentation.

Although this might appear to some to be a minor matter, we believe that it is not. It is critical that the Workers Compensation Board makes every effort to ensure that it is open and unbiased in its investigatory processes. The Board has a responsibility to ensure that all interviewees, including those with language difficulties, have a complete understanding of the process of the investigation and an opportunity to verify the accuracy of the investigator's report.

RECOMMENDATIONS

45. **The Workers Compensation Board must perform its investigating activities under an inquiry rather than an adversarial model. The information provided by all parties should be given equal weight in order to allow for fair and impartial adjudication.**

46. **It is the responsibility of the Workers Compensation Board to ensure that an interpreter is made available in all cases in which the interviewee does not speak English as a first language, in order to avoid any misunderstanding.**

47. **All interviewees should be provided with copies of completed statements for their future reference.**

48. **In cases in which the interviewee has limited literacy skills, a fully-literate third party should be present to witness the statement in terms of its accuracy, and the statement should be read in its completed form to the interviewee for this same reason.**

49. **Where the worker is represented by a trade union, the worker should be advised that s/he may have a union representative present during any investigation, if desired.**

6. Occupational Diseases

Compensation for occupational diseases is a major issue for workers' compensation boards in the 1980s. It is likely that given the long latency periods for many occupational diseases, and the increasing volume of information linking specific diseases to specific substances, the problem will become larger rather than smaller in the years ahead.

One of the difficulties for workers' compensation boards, lies in creating a structure which provides guidelines for the adjudication of recognized occupational diseases, while remaining flexible enough to address less common conditions. The system must also be able to include, on an ongoing basis, "new" occupational diseases as their etiology becomes known.

Several other jurisdictions include schedules of compensable occupational diseases, as regulations under their law. Two of the best-known occupational diseases which are invariably included in such schedules are asbestosis and silicosis, which result from exposure to asbestos fibres and silica particles (often in the form of silica sand) respectively. The major drawbacks suggested with regard to occupational disease schedules are that: 1) by specifically including certain conditions, they may in practice exclude the others, and 2) such systems are slow to respond to include other occupational diseases, despite medical information regarding etiology. In other words, it is difficult to ensure that an occupational disease schedule can be kept comprehensive and current.

Despite the difficulties of developing and updating an occupational disease schedule, we believe that this is the preferable method. However, we do not presume to possess the expertise, nor did we have sufficient time, to develop a schedule to be included in this Report. Therefore, we recommend that such a schedule be developed as soon as possible, by a **tripartite** body including representation from labour, industry and recognized medical experts. The completed schedule should include a list of diseases which are attributable to particular occupations or to particular workplace hazards. The body developing the schedule should also have the task of delineating the criteria for acceptance of occupational disease claims included in the schedule.

The Workers Compensation Board must retain a flexible approach to occupational diseases, despite the existence of a schedule (which should act as a floor and not a ceiling for adjudicating these claims). For those cases which fall outside the schedule, the Board must be prepared to examine all available information, weigh it carefully and make an informed and practical a judgement as is possible.

Paul Weiler, in his recent report to the Ontario government, recommends the establishment in Ontario of a body he calls an Industrial Disease Standards Panel. The panel has since been established and is composed of relevant scientists and medical specialists in the field of occupational disease and industrial hygiene, as well as representatives of labour and management. Their job is to develop, through review of the relevant literature and discussions, a Schedule of Occupational Diseases for Ontario.

The Ontario panel has also been charged with maintaining the Occupational Disease Schedule on the basis of new scientific information about diseases and their relationships to occupational exposures, by establishing new standards and/or refining existing standards as required.

This Committee is in agreement in principle with the establishment in Manitoba of a body parallel to the Industrial Disease Standards Panel. This model should provide an opportunity for the Board to keep its occupational disease standards relevant and comprehensive, and in line with the most recent and informed scientific and medical data available.

Since we recognize that this will be a lengthy process, we have commented on two of the more common occupational diseases—lead poisoning and noise-induced hearing loss—in this Report.

RECOMMENDATIONS

50. **A panel should be established to develop standards in the form of a Schedule of Occupational Diseases, to be implemented as a regulation under the *Act*. The panel should include representatives of the scientific and medical communities, and of industry and labour.**

51. **The standards developed by the panel should not limit the Board's authority to accept, on the balance of evidence, individual cases which are not covered by the Schedule.**

52. The panel should also be responsible for expanding and revising the Schedule on an ongoing basis, with reference to recent scientific and medical information.

7. Lead Poisoning

Lead poisoning is one of the oldest documented occupational diseases. It occurs as the result of chronic occupational exposure to lead. In Manitoba it is found most commonly in battery plant workers. As medical knowledge of the effects of lead on the human body has increased, "acceptable" standards for lead in air and in blood have decreased. Currently, The Manitoba Workplace Safety and Health Division requires that any worker whose blood lead level exceeds 50 micrograms (ug)/dl, should be relocated to a low lead area. If there is no low lead area they are to be removed from work. Unlike other jurisdictions (e.g., Ontario, Quebec, Nova Scotia, the United States, and Sweden), those removed from Manitoba workplaces, due to lead poisoning, are not ensured financial compensation. We were struck by the injustice faced by leaded workers who were, on the one hand, told by their doctors and/or the Workplace Safety and Health Division that to return to their usual work would jeopardize their health, and who may, on the other hand, be denied workers' compensation benefits. Workers in this situation can choose between two bad options: to quit work and face the economic consequences if they cannot quickly locate alternate employment, or to carry on working and jeopardize their long-term health. We found situations such as these to be extremely difficult for the individual and not in the best interests of public health. We have therefore recommended (in the section of this Report dealing with medical removal protection) that all workers removed from work because of exposure to hazardous sustances be provided with compensation, whether or not they are "totally disabled."

The Ontario Workers Compensation Board dealt with this matter some time ago, in a manner which we find to be appropriate. A December 1968 directive states, in part:

> where a person ... is forced to be off work because of a condition contracted from the employment, though not being disabled, he shall be entitled to compensation. Further, in any employment where an exposure creates a situation of physical danger to the individual and he is required to be taken out of that employment, if the employer cannot provide him with other work, he shall be entitled to compensation.
>
> This would apply to the lead poisoning and radiation *situation.*

On November 26, 1986, the Board of Commissioners issued a new policy (Board Order 198/86) regarding occupational lead poisoning. This replaced the previous Board Order of May 1985. Since this new Board Order postdates our public hearing, many criticisms of the old policy, by injured workers and unions, no longer apply. The old policy contained no blood lead level at which compensation benefits would automatically be paid. The new policy specifies that claims will be accepted if blood lead levels are 70 ug/dl or greater, or at 50 ug/dl, if there is no low lead work area or if the worker has been medically removed from work. It goes on to state that claims with lower blood lead levels may be accepted, following "complete investigation." The old policy required that all workers filing claims for lead poisoning be examined by a Workers Compensation Board Medical Officer, be hospitalized for treatment if recommended by a specialist named by the Workers Compensation Board, and, while in hospital, be attended by a specialist in internal medicine, named by the Workers Compensation Board. The new policy allows workers with lead poisoning to continue to be treated by the physician of their choice and requires only that the relevant information be sent to the Workers Compensation Board's designated specialist. It also states that in those cases where the worker is hospitalized for lead poisoning, the Workers Compensation Board may name a consulting, but not an attending, physician.

We believe that it is in the best interests of workers exposed to lead at work, for all of the authorities involved to work together in a well-coordinated manner. Our experience would indicate that current practices in this area could be much improved.

This is especially important in the case of occupational diseases, such as lead poisoning, which tend to be found in groups of workers performing the same jobs or working in the same workplace. Current Workers Compensation policy contains no reference to the fact that lead poisoning most often affects groups of workers—not singular employees.

Finally, we wish to comment on a particular case brought to our attention by the Canadian Auto Workers, in which a worker's compensation benefits for lead poisoning were going to be reduced by one week because the adjudicator determined that the worker had contracted lead poisoning, not as the result of an occupational exposure to lead, but rather as the result of "serious and willful misconduct." This occurred in a workplace were previous claims had been accepted and where there was a recognized lead problem. The misconduct was described by the Workers Compensation Board as allegations by his employer, that he had not shaved off his beard *(which would interfere with* a proper respirator fit), that he left the work premises without showering and that he wore a T-shirt under his company uniform, which he then wore home. If management believed that the worker's beard interfered with a proper respirator fit or that his personal hygiene was improper, then this issue should have been dealt with at the workplace. It is not a compensation issue. In this case, after intervention by the union, his benefits were not reduced. The practice just described, however, is akin to saying that compensation is not payable in back injury cases, if the employer has instructed the worker in proper lifting techniques. It is another example of the trend, which we oppose, towards an increasingly adversarial compensation system.

RECOMMENDATIONS

53. **That all workers removed from work because of occupational lead poisoning receive compensation benefits, for the duration of this removal.**

54. **That, where the treating physician believes the worker's health will be jeopardized by a return to a leaded environment (and where the employer cannot provide suitable, alternate employment), the worker be eligible for the rehabilitation benefits outlined elsewhere in this Report. If the Workers Compensation Board disagrees with the opinion of the treating physician, it may refer the worker for a second opinion.**

55. **That the Workers Compensation Board work more closely with the Workplace Safety and Health Division, to ensure that workers with lead poisoning receive well-coordinated services.**

8. Hearing Loss

The Workers Compensation Board provides compensation to workers whose hearing is damaged as the result of their employment. These workers are eligible for permanent partial disability awards proportioned to the extent of their hearing loss. **The current maximum rateable pension for total deafness is 30 per cent.** Two types of hearing loss are compensated:

1) traumatic hearing loss, from a very loud noise or from welding sparks

2) gradual hearing loss from long-term work in noisy environments. There are three issues related to compensation for noise-induced hearing loss, which were brought before our Committee:

    a) the assessment of occupational noise exposure, by the Manitoba Workers Compensation Board

    b) the rating schedule used by the Manitoba Workers Compensation Board, to compensate workers with noise-induced hearing loss and

    c) compensation for tinnitus (ringing in the ears).

In assessing whether or not to accept a claim for noise-induced hearing loss, the Workers Compensation Board must first determine whether or not the worker's hearing loss is the result of work-related noise exposure. There are three ways to gain this information. The first is by taking a thorough, occupational history to determine whether or not the injured worker has been exposed to levels of occupational noise which may have led to noise-induced hearing loss. In cases of traumatic hearing loss, this is a simple task. In cases of long-term noise exposure, however, a more complete history is essential to good adjudication. The special form (3H) used by the Manitoba Workers Compensation Board does have space for injured workers to detail their noise-exposure over the years.

The second method by which information may be obtained is through on-site inspections. In the last few years, the Manitoba Workers Compensation Board has begun to routinely send Claims Officers from the Special Claims Unit, to perform worksite noise assessments when a worker files a claim for noise-induced hearing loss. This is problematic in several aspects:

1 **Workers Compensation Board staff may not be properly trained in the use of noise dosimeters.** Such inspections are properly the mandate of the Workplace Safety and Health Division, whose staff is trained to perform these tasks.

2 **Workers Compensation Board staff may conduct inspection without the injured worker or his/her representative being present.** Regulations under *The Workplace Safety and Health Act* ensure that the Worker Co-chairperson of the joint labour-management Health and Safety Committee, or his/her designate, be present when a Safety and Health Officer inspects a workplace. This provision was placed in the Regulation, to guarantee workers the right to participate in safety and health matters. **This right to participate is undermined by the inspection practices of Workers Compensation Board Claims Officers.**

3 **The noise levels recorded today may or may not be comparable to those which existed in prior years,** since considerable

progress has been made in some workplaces to reduce noise exposure. **Chronic noise-induced hearing loss takes years to develop, and so any measurement of today's noise levels must not be used as the sole factor in denying a worker's claim for noise-induced hearing loss. It is our understanding, however, that this is the present practice of the Manitoba Workers Compensation Board. For all of these reasons, we believe that such inspections by Claims Officers are not useful in the adjudication of claims for noise-induced hearing loss.**

Information regarding the extent of occupational noise exposure is then analyzed to determine whether or not it is sufficient to cause hearing loss. **The adjudicative policy of the Manitoba Workers Compensation Board is to deny any claim for noise-induced hearing loss, where the worker was exposed to less than a 90-decibel noise level, averaged over an eight-hour day.** The 90dBA level was chosen because it is the current, maximum allowable noise exposure in the province of Manitoba. It does not constitute a level of complete safety. It was a negotiated compromise between labour, management and government. The United States National Institute of Occupational Safety and Health has determined that exposure to occupational noise at the 90dBA level for an eight-hour working day, will, in the long term, lead to significant hearing loss in 30 per cent of the population. Under the current policy, however, these workers would not be eligible for compensation. **The misuse of the *ceiling* for noise exposure, as a *floor* for compensability is indicative of the limited knowledge of occupational health, at the Manitoba Workers Compensation Board.**

The third method used to assess occupational noise exposure is audiometric testing. Because noise-induced hearing loss is first noticed in the high-frequency area (4 to 6 kilohertz), and because, as the effects of noise exposure continue to worsen, this pattern becomes more noticeable, **noise-induced hearing loss is easily distinguishable from other types of hearing loss, by audiometric testing.** We are concerned that the Manitoba Workers Compensation Board requires that all workers claiming noise-induced hearing loss must, after initial testing by a specialist, be re-tested at a tertiary care facility—the Health Sciences Centre in Winnipeg. We are concerned about this unnecessary duplication, for two reasons:

1) it is an unnecessary and therefore wasteful use of scarce health care resources

2) it delays the adjudication process.

The second broad set of issues raised at our public hearings concerned the rating schedule used by the Manitoba Workers Compensation Board, to set permanent partial disability awards, in cases of noise-induced hearing loss. Not surprisingly, it was the universal belief of injured workers with compensable hearing loss, that they were being undercompensated. Having reviewed the Manitoba Workers Compensation Board's rating schedule, we too question its adequacy. We understand that no amount of money will restore hearing, and that any rating schedule is, to some extent, arbitrary. **However, we have concluded that in the rating of noise-induced hearing loss, as in the rating of other impairments, the American Medical Association's *Guides to the Evaluation of Permanent Impairment* should be used by the Manitoba Workers Compensation Board, with one important exception. We propose that in addition to the impairment rated per the American Medical Association's *Guides*, that an additional amount of up to 5 per cent be awarded in cases of tinnitus. Other jurisdictions already make such awards.** We base this conclusion on the testimony of injured workers suffering from tinnitus. The constant ringing in their ears (a condition which they must live with forever), disrupts their lives, makes sleep difficult and causes irritation and frustration. We believe that this is a valid impairment which must be recognized by the compensation system.

RECOMMENDATIONS

56. That the American Medical Association's Guides to the *Evaluation of Permanent Impairment* be used to rate levels of impairment resulting from noise-induced hearing loss.

57. That in addition to the rateable impairment for noise-induced hearing loss, specified in the American Medical Association's *Guides*, an additional award of up to 5 per cent be made in cases of tinnitus.

58. That those workers who are disabled (i.e. who cannot continue their employment) as a result of their impaired hearing, should receive the same benefits as other disabled workers, including rehabilitation services and a prospective wage loss pension.

59. That Workers Compensation Board staff not conduct workplace noise inspections unless:

a) they have been thoroughly trained

b) their inspection procedures comply with the provisions of *The Workplace Safety and Health Act*.

60. **That the maximum allowable noise exposure (currently 90dBA) not be used as a minimum standard for establishing the compensability of a claim for noise-induced hearing loss. Compensation should be provided in all cases where the occupational history demonstrates significant noise exposure and where audiometric testing establishes a rateable impairment.**

9. Psychological Conditions

It is clear from reading The Workers Compensation Act, that the drafters of the legislation recognized, in certain cases, that psychological conditions should be considered compensable. This is evident from the *Act's* definition of pre-existing conditions, reproduced below:

> **Definition of "pre-existing or underlying condition."**
>
> 34.1(2) In this section "pre-existing or underlying condition" means a condition of the workman which existed or was discernible as an underlying condition before the accident and includes a neurosis and a psycho-neurosis.

When discussing medical panels, the *Act* also makes reference to psychological conditions which are to be addressed through establishment of a neurosis review panel. The sections specifically referring to the neurosis review panel are reproduced below. For procedures referring to all medical panels, the reader is also referred to sections 54.1(2) to 54.1(11) of *The Workers Compensation Act* of Manitoba.

> **Definition of "panel."**
>
> 54.1(1) In this section, "panel" means a medical review panel or the neurosis review panel, as the case requires; and, where a medical matter does not relate to neurosis, psycho-neurosis or silicosis, a reference of a matter under this section by the board shall be to a medical review panel, and where a medical matter relates to a neurosis or a psycho-neurosis a reference of the matter under this section by the board shall be to the neurosis review panel.
>
> **Establishment of a neurosis panel.**
>
> 54.1(9) There shall be established a neurosis review panel consisting of three physicians appointed by the board from physicians specially skilled in neurosis and psycho-neurosis nominated for that purpose by The Manitoba Medical Association to hold office for a term fixed by the board and thereafter until their successors are appointed and the board shall designate one of the physicians as the chairman of the panel.
>
> **Opinion of neurosis review panel.**
>
> 54.1(12) The opinion of the neurosis review panel as to whether a claimant suffers from a neurosis or psycho-neurosis and the degree thereof is final and binding on the board and the claimant.

Clearly, legislators intended the psychological effects of occupational injury and disease to be addressed by the Workers Compensation Board. However, in recent years, use of the neurosis review panel has practically ceased. The reason for this lies in changes by the Board of Commissioners, to its policies regarding compensation of psychological conditions.

On March 20, 1983, the Board of Commissioners approved a Board Order entitled "Criteria for Acceptability of Psychological Conditions." The Board Order provides four common conditions which may result in "permanent impairment of the accident victim's psychic functions" including chronic brain syndromes, psychoses, neuroses and personality disorders. General evaluation criteria and guidelines for determination of severity are provided. These guidelines, together with the *Act's* provision for establishment of neurosis review panels, provide for adjudication based on information obtained from psychiatrists and/or psychologists, regarding the effects of the compensable injury or condition, on psychological functioning. Furthermore, the *Act* recognizes that a pre-existing psychological condition may be aggravated or enhanced by the compensable injury or condition. The policy suggests that at that time, cases in which a psychological impairment had been identified were adjudicated on the basis of expert opinion, with the neurosis review panel being used to address any differences of opinion.

However, on January 29, 1984, the Board of Commissioners approved Board Order No. 114/84 which replaces the policy previously discussed. The later policy places restrictions on acceptance of psychological trauma. Conditions recognized by the Board are:

1. Organic brain damage from a traumatic compensable head injury.
2. A psychological reaction or condition which is a direct result of a serious, compensable, life-threatening, injury/event (serious in this context means an accident that threatens life or direct

involvement in a life-threatening incident or event).

3. Psychosis resulting from exposure to harmful chemicals at the worksite.
4. Psychosis resulting from use of drugs used in the treatment of a compensable injury.

In other words, current policy allows acceptance of specified forms of organic brain trauma, as well as psychological conditions resulting from accidents which, in the opinion of the Workers Compensation Board, are life-threatening.

There are two elements of this policy which should be understood:

1) entitlement depends upon the seriousness or potential seriousness of the physical trauma resulting from the incident, not the seriousness of the psychological condition itself.
2) expert evidence establishing a psychological condition as resulting from a compensable incident will not necessarily lead to acceptance of the psychological condition as compensable.

Therefore, a serious and debilitating psychological condition resulting from a "minor" incident would not be compensated, while a more minor psychological condition resulting from a "serious" incident presumably would.

A fundamental tenet of rehabilitation psychology is that it is not possible to predict the severity of psychological trauma, on the basis of the seriousness of illness or injury. Different individuals have differing abilities to cope and to adapt. Also, an injury or illness may occur, even in the life of a person with excellent coping skills, at such a time as to be the "last straw" and, consequently, may provoke a serious psychological condition.

We believe that the current policy of the Workers Compensation Board with respect to psychological conditions is not acceptable. It does not meet the Board's responsibility under the *Act*, to obtain sufficient expert opinion to:

1) determine the extent of psychological impairment

2) establish the relationship between the psychological impairment and the compensable incident or condition.

The current policy says to injured workers, "only if you were almost killed, or could have been killed, do you have the right to suffer psychologically." As previously suggested, the policy does not reflect the current expert understanding of the complex relationship between physical impairment and psychological disability.

Adjudicating the compensability is a difficult task. However, we believe that it is the responsibility of the Workers Compensation Board to do so (despite the difficulties), by obtaining the best expert opinion available. The current policy allows the Workers Compensation Board to terminate the benefits of injured workers who are functionally unemployable due to a psychological condition whose relationship to the compensable condition is not disputed, but which is not compensable because the incident itself was not life threatening. This can be done because the barrier to re-employment is considered non-compensable by definition under policy.

We believe that the current policy of the Workers Compensation Board with regard to psychological conditions is in contravention of the intention of the existing *Workers Compensation Act*. We also feel that it reflects a tendency, noted elsewhere in this Report with reference to other policy issues, to develop policies which do not always recognize individual circumstances.

The Workers Compensation Board is charged with making difficult and complex decisions. We believe that it cannot divest itself of this responsibility.

The Committee has another serious concern with regard to the Board's current treatment of psychological conditions. We have heard of cases in which injured workers felt required to undergo psychological assessments, upon threat of termination of benefits, for non-compliance. Clearly, in addition to our concern regarding the Board's use of termination for "non-cooperation" as a method of "motivation," we perceive the entire situation around the requiring of psychological assessments as a catch-22 for the injured worker.

As the psychological policy is currently constituted, if a psychological condition is identified following an assessment, a termination of benefits may result, since the condition may not be compensable under current policy. Therefore, if the injured worker refuses a psychological assessment, s/he faces termination of benefits for non-cooperation. If an assessment is completed and a psychological condition identified, the injured worker may face termination of benefits, due to a non-compensable condition.

In essence, the result of the Board's current policy, together with its practice of requiring certain injured workers to undergo psychological assessment, is not improved diagnosis and treatment of employment-related psychological conditions, but rather increased case closures. We do not believe that increases in case closure are in themselves indicators of improved service. In this particular case, we believe the opposite to be true.

Therefore, we unanimously agree that the Board should immediately cease from demanding that claimants undergo psychological assessments. We do, however, believe that in cases in which a psychological condition is suspected, referral for assessment may be recommended and encouraged.

RECOMMENDATIONS

61. **The Committee recommends that the current policy of the Workers Compensation Board, with regard to the adjudication of psychological conditions, as outlined in Board Order No. 114/84, should be revoked.**

    We believe that it is the responsibility of the Workers Compensation Board to adjudicate claims for psychological conditions resulting from occupational injury or illness, on their merits, based on expert opinion regarding the severity of the impairment and of the relationship to the compensable condition.

    The Committee recognizes the difficulties involved in adjudication of psychological conditions. However, we do not believe that these difficulties can or should be addressed through imposition of a blanket policy, particularly one which allows for benefits and services to be terminated despite the existence of a recognized psychological condition—related by expert opinion to the compensable incident or condition, and severe enough to affect re-employment. We believe that this policy conflicts with the intentions of *The Workers Compensation Act*.

62. **The Workers Compensation Board should cease from requiring injured workers to undergo psychological assessment, and from alleging non-cooperation in those cases where the worker does not comply.**

    However, we feel that in cases where a psychological condition is suspected, the Board should recommend and encourage an assessment, in order to determine the appropriate follow-up and treatment.

10. Chronic Pain and Chronic Pain Syndrome

Chronic pain and chronic pain syndrome claims, represent some of the more difficult cases for compensation boards to administer. We outline below, a prescription for changing the Board's present policy in this area. However, we want it understood that these recommendations are not intended to, nor should they, open the floodgates to a rash of such claims. It is important that cases of chronic pain receive the best of medical attention, to rule out possible physical causes for the condition.

In September and October of 1984, the Board of Commissioners of the Manitoba Workers Compensation Board adopted policies dealing with chronic pain syndrome. Board Order 158/84, dated October 31, 1984, defined "chronic pain syndrome" as:

> a perceptual illness for which there are no objective clinical findings which would be consistent with the degree of pain as expressed by the subjective complaints.

Chronic pain syndrome was, the Board determined, not a compensable condition. We disagree with this policy for two reasons:

> 1) because adjudicators are, by this policy, instructed to terminate benefits to claimants, without testing the relationship between the claimants' ongoing complaints and their compensable conditions, and
>
> 2) on humanitarian grounds.

We will discuss the latter point first.

Workers with chronic pain following a compensable injury are generally depressed, vulnerable people. Their self-identity is threatened. They were once workers; they are now patients. They have, in all likelihood, been seen by many doctors, none of whom have been able to make the pain stop, or even make it diminish to the point of tolerance. They may feel that their sanity is being questioned. They may even have questioned their own sanity. Compensation benefits should not be terminated at such times.

Secondly, this policy does not, in our opinion, accurately reflect *The Workers Compensation Act* or the intention of the legislators who adopted it. It is a direct instruction to adjudicators, not to apply the test of "arising out of and in the course of employment" and the rule of presumption, contained in section 4(5). To properly adjudicate a claim where, at some point following the compensable injury, a diagnosis of "chronic pain syndrome" has been made, the adjudicator should:

1) determine whether or not the chronic pain preexisted the compensable injury. If it did, then the rules for the adjudication of pre-existing conditions should apply, as discussed elsewhere.

2) determine whether the chronic pain syndrome is related to the compensable injury, applying the rule of presumption. That is, **if it cannot be proven that**

there is another cause, not related to the compensable condition, which led to the development of chronic pain syndrome, then responsibility should be continued.

But this is not the end. It should be followed by supportive counselling or referrals to a pain clinic or rehabilitation centre, and whatever else is necessary to help the worker with chronic pain learn to live with that pain as best s/he can.

There are many hypotheses regarding the etiology of "chronic pain syndrome." The Manitoba Workers Compensation Board appears to favour the "secondary gain" hypothesis. This hypothesis assumes that chronic pain syndrome develops because, in some way the person in question benefits from the pain. In compensation cases, this gain is perceived to be monetary. To put it succinctly, some would argue that as long as the system pays people to be sick, they will be sick, rather than be well and return to work. We reject this hypothesis.

There may, indeed, be isolated cases where injured workers set out to defraud the system by feigning pain. But there currently exists, medical expertise to determine whether or not an inidividual's pain is real to him/her. Certainly, we are not recommending that benefits be continued in fraudulent cases. But the current Workers Compensation Board policy makes no distinction. It makes a category of claimants ineligible for benefits, by virtue of the diagnosis "chronic pain syndrome." **It should not be the diagnosis which determines compensability, but rather the etiology of the condition.**

In those cases where the chronic pain results from the compensable injury which "arose out of and in the course of employment," then the Workers Compensation Board should be responsible for continuing benefits, and for assisting the injured workers in question—either to have their pain reduced or eliminated, or to live with what pain remains, as well as is possible.

RECOMMENDATIONS

63. **Board Order 158/84 regarding Chronic Pain Syndrome should be rescinded.**

64. **The Workers Compensation Board should adjudicate chronic pain claims in the same manner as other claims for which compensation has been awarded.**

    In those cases where the chronic pain results from the compensable injury which "arose out of and in the course of employment," then the Workers Compensation Board should be responsible for continuing compensation benefits.

65. **The Workers Compensation Board should provide claimants with chronic pain syndrome, with the necessary assistance to reduce and/or manage their pain.**

    These claimants will require a supportive and flexible compensation system, the objective of which should be to return them to meaningful employment.

11. Special Claims Unit

The Claims Department of the Workers Compensation Board has a Special Claims Unit which is mandated to deal with some of the more difficult areas of compensation adjudication, such as occupational disease, repetative trauma, etc. The first obeservation the Committee members made when looking at this Unit, was that it was handling claims for conditions such as Reynaud's Phenomenon (white finger disease) and tenosynovitis. We believe that the compensability of such conditions is sufficiently well-established that, with some training, the adjudication of such issues can be turned over to Claims Officers, while still ensuring proper adjudication.

Secondly, inexperience among staff members of the Claims Department was often cited as one reason for some of the administrative concerns noted earlier. We believe that the experience of the individuals in the Special Claims Unit may serve a greater long-term purpose to the Workers Compensation Board, if they were placed in the role of Senior Claims Officers whose duties would entail training, advising, and assisting the Claims Officers and Claims Processors. With the off-loading of some of the more normal compensation claims from these individuals, such as we have suggested, they should have time to work on the more difficult claims as well as to provide the essential service of improving the skills of the other adjudicators. We believe that initial adjudication is one of the more important functions of a compensation system. If excellent decision-making takes place at the front end of the compensation system, problems can be averted.

RECOMMENDATION

66. **That the Special Claims Unit no longer be responsible for adjudicating some of the more well-known and easily adjudicated conditions, such as claims for hearing loss, repetitive trauma disorders, and Reynaud's Phenomenon. Members of the Special Claims Unit could then spend the additional time which is gained, in training and working with less-experienced adjudicators. Ideally, adjudication staff should be able to competently handle all claims being**

filed, without having to use the services of a Special Claims Unit.

IV. SUMMARY

In summary, our concerns about the way in which the Manitoba compensation system handles claims for temporary total disability are threefold:

1) in some areas, legal changes are needed,
2) in some areas, Board policies should be changed to better reflect the intent of the legislation,
3) in some areas, Workers Compensation Board administrative practices should be improved to ensure that injured workers receive a high quality of service.

For some time, the Workers Compensation Board, itself, has acknowledged that its current delivery system may not be the best one for those injured workers with long-term disabilities. The Board, therefore, established a Long-Term Disability Committee, in March 1986.

In March 1987, we obtained a **draft** copy of that committee's final report. The comments which follow are in response to this draft. While, ideally, we would have preferred to comment on the final version of the report, the Board was unable to approve the final version prior to our own deadline. It is unlikely that any major recommendations of the Long-Term Disability Committee will be changed in the final version, and because their general approach is of concern to us, we have chosen to comment on the report in its draft form.

In its report, the Long-Term Disability Committee addresses many of the issues which were also of concern to our Committee. Our proposed solutions, however, are diametrically opposed. We favour a system which is basically self-policing, relying on the information supplied by doctors, employers and injured workers. The Long-Term Disability Committee favours ever greater intervention and direct control, by the Workers Compensation Board, of injured workers. They call for appeals adjudicators to uphold the decisions made by Claims Officers and Vocational Rehabilitation Counsellors. We favour an appeal system which is more, not less, independent of the adjudication process. These suggested solutions will have a negative impact on relations between the community and the Workers Compensation Board.

Neither do we believe that they will solve the problems which they set out to address. They will result in claims control; they will not result in the rehabilitation and return to work of those injured workers so unfortunate as to suffer long-term disabilities.

CHAPTER 7

REHABILITATION ISSUES

I. INTRODUCTION

Since 1982 the Vocational Rehabilitation Services Department of the Manitoba Workers Compensation Board has undergone a major expansion in staff and programs. These changes occurred in response to a recognition of the need for expanded services to injured workers experiencing difficulties in returning to pre-accident work, due to a compensable injury or condition. Expansion of rehabilitation services had been recommended both by Dr. Walter Lampe in his 1980 report and by the report of the Rehab 100 Committee in 1984.

Despite the expansion of rehabilitation services with the attendant increase in costs, the Committee has heard from injured workers, labour groups and employers that the current system remains inadequate.The Manitoba Workers Compensation Board purports to provide, as do the majority of Compensation Boards in Canada, vocational rehabilitation services. However, although section 24(21) of the Manitoba *Workers Compensation Act* is titled "Measures for rehabilitation," the term vocational rehabilitation does not occur in the legislation. Section 24(21) is very general, authorizing as it does the taking of such measures, and making of such expenditures as the Board "deems necessary or expedient" for the purpose of "aid(ing) in getting injured workmen back to work and to assist in reducing or removing any handicap resulting from their injuries." It should be noted that the *Act* indicates the Board **may** take such measures and make such expenditures. However, it does not suggest that the organization is required, or even expected, to do so. Section 24(16) also allows for funding of vocational training for injured workers suffering a permanent impairment, in the event that the training "is likely to increase his future earning capacity."

There exists a large body of literature related to vocational rehabilitation, particularly from the United States where it is recognized as a separate vocation requiring specialized, professional training. Before reviewing the vocational rehabilitation services provided by the Manitoba Workers Compensation Board, it would be useful to consider how the profession defines vocational rehabilitation in terms of both its purpose and process.

II. WHAT IS VOCATIONAL REHABILITATION

1) Definition

In simplest terms, vocational rehabilitation is a process whose goal is to assist persons with identified physical disabilities in obtaining appropriate employment. The critical term is **vocational**, which separates this service from the medically-oriented service of physical rehabilitation. Some commentators also talk about "total rehabilitation"—a concept encompassing vocational matters as well as medical treatment, housing, recreation and all other issues related to the barriers resulting from a disease or injury. Still others distinguish between rehabilitation and habilitation, the latter referring to the initial process of training and education of disabled persons who have never lived independently having, for example, been born with a congenital disability. In such cases, re-employment, or more accurately employment, may not be a primary focus.

In general, however, rehabilitation may be seen as a restorative service, with vocational rehabilitation having as its focus, readaptation within the context of employment. Vocational rehabilitation services are designed to assist the client in identifying and obtaining alternative employment when vocational change is demanded by his or her physical condition.

2) The Vocational Rehabilitation Process

Although specific terms may differ among commentators, the stages of the vocational rehabilitation process may be described as follows:

1) Evaluation/assessment
2) Plan development
3) Service delivery/coordination
4) Job placement

Different agencies offering vocational rehabilitation services will have available in-house or on a referral basis various specialists to provide appropriate services at each stage of the process. For example, psychologists may be available to perform extensive vocational evaluations, while job placement specialists may become involved at the point that the client is job-ready. The specific services available may differ significantly from agency to agency. However, the end goal will remain the same, i.e. to match the abilities of the client with the requirements of a job in the labour market.

3) Expertise in Vocational Rehabilitation

Generally, the Vocational Rehabilitation Counsellor (or whatever title may be used within the specific setting) is not expected to provide all necessary services directly, but rather to coordinate the input of various specialists toward the goal of re-employment.

As noted above, the initial phase of the vocational rehabilitation process is evaluation and assessment. The goal is to assist the client in identifying skills and abilities, as well as limitations and weaknesses related to jobs existing in the local labour market. During the vocational rehabilitation process, services will be provided aimed at enhancing skills and abilities and minimizing or eliminating weaknesses related to the identified job goal.

Development of the vocational rehabilitation plan depends to a large degree for its success on a thorough assessment and evaluation of the client's situation and abilities. This information allows the client and the Counsellor to determine a realistic job objective, and to specify the services required to assist the client in reaching that goal. Services may include anything from academic training to attendance at a Job Finding Club. The services should reflect the individual circumstances of the client and the final re-employment goal.

Service delivery and coordination are basically the same process. As noted, the Counsellor generally does not attempt to provide all services directly but oversees the process and coordinates the input of various specialists or programs (such as community colleges, trainers, etc.).

In theory, by the end of the service delivery and coordination phase, the client should possess the skills necessary to perform the duties of the job identified during the plan development stage. The extent to which the service delivery agency will provide direct assistance in obtaining an employment situation also differs from agency to agency. However, good goal-setting demands that the job target be a realistic one, i.e. that the identified positions exist in the community and pay an acceptable wage.

4) The Role of the Rehabilitation Counsellor

As previously stated, the Vocational Rehabilitation Counsellor is the coordinator of services, ensuring that the appropriate services are delivered at the appropriate times and facilitating communication among the involved parties, including the client.

However, the Counsellor has another central function, which is to develop a working relationship with the client and to assist him/her to define a realistic and acceptable re-employment goal. The professional literature emphasizes the importance of vocational planning deriving from a cooperative, interactive relationship between the Counsellor and client. In other words, the vocational plan, including the re-employment goal, must reflect and address the client's specific abilities/disabilities, needs and **interests**.

Although the Vocational Rehabilitation Counsellor's job definitely includes advising the claimant when his/her re-employment goals are unrealistic and the reasons for this assessment, the goal must grow from the client's choice rather than being externally imposed by the Counsellor. Common sense dictates that a person will be more committed to a goal or plan for which s/he can feel a sense of pride and identification, than to one perceived as imposed or as "belonging" to someone else. Therefore, the Counsellor's major task is to involve the client in plan development, making use of all of the information generated during the assessment phase, in order to assist the claimant in identifying the specific re-employment goal and to recommend the service input required to attain that goal.

In the United States, vocational rehabilitation agencies are required by law to provide clients with an Individualized Written Rehabilitation Program (I.W.R.P.) which outlines the eventual re-employment goal as well as the services and strategies to be used to attain stated goals, both short- and long-term. This document is developed with the **client**. The Workers Compensation Board in Quebec also provides an individualized plan prepared in cooperation with the injured worker in consultation with the accident employer. As in the United States, the plan includes goals and services to be provided to meet those goals. The plan is considered an agency decision and is appealable as such. However, we found no evidence of the widespread use of this "contracting" approach within rehabilitation agencies in this country.

5) Summary

The term vocational rehabilitation describes the ability of the service agency to assist its clients in identifying a realistic and appropriate re-employment goal. It must do so by addressing the interaction of such variables as the nature of the limitations imposed by the client's disabling condition; his/her demonstrated interests, abilities and aptitudes; transferable skills; and the specifics of the local employment market.

With regard to technology, the process demands availability of considerable expertise in assessment of skills and aptitudes, as well as knowledge of appropriate services available in the community. It also requires access to detailed labour market information.

Perhaps central to the vocational rehabilitation process is the expertise of the Counsellor in promoting cooperative planning with clients in order to assist them in attaining employment which will be physically appropriate as well as satisfying. The professional expertise of the Vocational Rehabilitation Counsellor ensures that the client has access to the information necessary to set goals, and to assist in interpreting the multiple information sources for use by the client in identifying a re-employment goal which will be realistic, practical and satisfactory over the long term to that individual.

Although written rehabilitation plans are required by law in the United States, such contracts are not common in Canada outside of the province of Quebec.

III. Vocational Rehabilitation and the Manitoba Workers Compensation Board

1) *The Workers Compensation Act*

The Manitoba *Workers Compensation Act* does not provide a great deal of specific direction regarding the provision of vocational rehabilitation services. Two sections of the *Act*, reproduced below, relate specifically to what would generally be considered as vocational rehabilitation concerns:

> **Vocational training.**
> **24(16)** The board may provide for any injured workman, whose earning capacity in his previous occupation has been permanently impaired by the injury, such vocational training as may be deemed advisable for the purpose of preparing the injured workman for another occupation to which he may seem adapted and which is likely to increase his future earning capacity; and to that end the board may contract with an institution or institutions furnishing such vocational training, and may adopt rules and regulations for that purpose and for the payment of the training.
>
> **Measures for rehabilitation.**
> **24(21)** To aid in getting injured workmen back to work and to assist in reducing or removing any handicap resulting from their injuries, the board may take such measures and make such expenditures from the accident fund as it deems necessary or expedient.

Various other sections of the *Act* relate to matters which may affect rehabilitation; for example, the level of benefits being paid. However, these more general sections will be discussed below in the context of those rehabilitation issues to which they relate.

With regard to the two sections quoted above, it should be clearly noted that both are discretionary. In both instances, the legislation provides permission for ("the board **may**") but not entitlement to, rehabilitation services.

The *Act* also does not provide any description in section 24(21) of the services which may be provided, nor is the term vocational rehabilitation specifically used. Section 24(16) specifies that costs of vocational training may be provided, but leaves the mechanism for determining eligibility and administering the program to internal policy and procedure.

In short, anyone referencing the current legislation for clarification regarding guidelines for entitlement to rehabilitation services and benefits or an outline of the program will be disappointed. Vocational rehabilitation services within the Manitoba Workers Compensation Board are formed and directed by internal policy and procedures.

It should be noted that with regard to the apparently limited attention given to rehabilitation in the governing legislation, Manitoba is more in the mainstream than it is an anomaly. In its recent legislation relating to workers' compensation, the province of Quebec has made a fairly radical departure in that it has attempted to address issues of eligibility for service within its legislation. In Quebec, vocational rehabilitation services are included in the *Act* as an **entitlement** for any injured worker suffering a permanent physical or mental impairment as the result of an industrial accident or occupational disease. Other Canadian jurisdictions, however, have *Acts* which also describe rehabilitation services as discretionary rather than as an entitlement.

2) Policy

Policy generally refers to those written directions and guidelines approved at the administrative level. This is not to say that policy creation is initiated only at the highest levels of an organization. Department directors may, and do, present to administration recommendations for policy or policy change. However, the authorization for implementation is assumed to be an administrative function.

Without policy direction, it is impossible to establish programs and the procedures through which programs are realized as services. In cases of a "policy vacuum," it is not uncommon for policy to be created and implemented by departments with administrative authorization being sought after the fact. The problem resulting from such a situation for the outside observer or analyst is that policy becomes very difficult to identify and isolate. Since it may not exist in written form, policy may become at times indistinguishable from practice and procedure. Such unwritten policy is also more changeable since administrative approval for change is not required.

The Manitoba Workers Compensation Board has explained to this Committee that there did exist within that agency a rehabilitation policy vacuum prior to

1982. This has clearly led to some of the conditions which have been described. For example, the Vocational Rehabilitation Services Department has produced a Procedure Manual, available to the public, which presents an overview of rehabilitation policy. The material included in the Manual is illustrated by its Table of Contents (see Figure 1). The Manual was approved by the Board of Commissioners, thereby becoming a policy document as per the definition presented at the beginning of this discussion. However, the Board recognizes that the Manual requires updating to reflect more recent policy initiatives.

In August 1985 the Vocational Rehabilitation Services Department also produced a draft copy of a Training Manual for use by department staff. This Manual provides other policy information not included in the Procedure Manual (see Figure 2). Although also requiring revision and updating in certain areas, the Training Manual appears to be as accurate a reflection of practice and program as the Procedure Manual. However, it has never been formally approved by the Board of Commissioners and is not publicly available. Therefore, according to our earlier definition, this Manual is not a policy document.

FIGURE 1

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In short, policy related to the rehabilitation services of the Manitoba Workers Compensation Board is still in the process of creation. Many of the guidelines for service are not in written form, having not been formally approved by administration. **However, one must assume that administration, in this case the Board of Commissioners, is aware of the programs and services of the department and thereby provides general, informal support and authorization for departmental initiatives even where formal policies have not yet been produced.** As noted earlier, however, policy generated by necessity on the departmental level also tends to be highly changeable in response to administrative reactions.

In situations where a policy vacuum leads to the development of relatively informal policy (often generated on a reactive basis at the departmental level), obtaining a "snapshot" of policy at a point in time to use in analysis on a policy-by-policy basis becomes practically impossible. We believe that this is the situation at the Manitoba Workers Compensation Board with regard to rehabilitation services.

The question inevitably arose of how this Committee could fulfill its mandate to critically review policy related to vocational rehabilitation services and recommend change when much of the policy is not formalized and is in a process of ongoing change. Although it became clear that review on a policy-by-policy basis would be impractical, both due to time restraints and the inevitability of policy changes making the analysis and recommendations irrelevant, we feel that we have obtained an understanding of the parameters of the rehabilitation program and its philosophy.

Analysis of the Vocational Rehabilitation Services Department will make reference to certain policies, in place at the time of review, to illustrate the philosophy and underlying assumptions of rehabilitation services offered by the Workers Compensation Board of Manitoba. Although certain specific policies will be addressed and recommendations made for positive change, it is hoped that this somewhat more general approach will be appropriate since, more so than the Claims area, Vocational Rehabilitation Services involves issues of policy development as well as policy change.

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3) Rehabilitation Services of the Manitoba Workers Compensation Board

The Procedure Manual of the Vocational Rehabilitation Services Department clearly defines the parameters of service as **directly** employment related: **"as a general rule, only those services that are necessary to return the worker to employment or that can be demonstrated to be cost effective should be considered."** (p.5.1.) The document also details service goals in order of priority. These may be summarized as follows, in order of preference by the department:

1) return to work, accident employer, original job.
2) return to work, accident employer, different job.
3) return to work, different employer in related industry.
4) return to work, different employer, different job.
5) training-on-the-job, different employer, different job.
6) academic retraining (p.5.1. & 5.2.).

In summary, services focus on return to work with the accident employer, in pre-accident or alternative duties, or the marketing of the client on the basis of skills deemed "transferable" to a related industry. Retraining is considered as a final recourse with training-on-the-job preferred over academic training.

These service priorities are not unusual for rehabilitation services growing out of workers' compensation systems both in Canada and the United States. Such a system, concentrating as it does on identification of transferable skills and the determination of cost-effectiveness in program planning, must come to terms with certain questions of a technological and of a philosophical nature. (Of course, as is usually the case, technology and philosophy tend to overlap from time to time.)

Technological questions include, for example, the following:

1) How does the system identify work-related skills which are transferable to other employment?
2) What data is required to demonstrate whether or not a given plan is cost effective, and how can this information be obtained?

These technological concerns are critical since transferable skills and cost-effectiveness are linchpin concepts in this approach to service, and the content assigned to them in relation to individual cases determines to a large extent the scope and direction of the rehabilitation services provided.

In a system sensitive to issues of cost, which emphasizes transferable skills over retraining, the major philosophical issue relates to the role of the service recipient in the planning process. Although the professional literature describes the necessity of cooperative planning leading to an individualized rehabilitation plan which is responsive to the client's needs and desires, commentators have noted that the real world seldom reflects the ideal. Issues of cost can displace other considerations, leading to rehabilitation plans being implemented because they are less expensive rather than because they are appropriate. In these circumstances, the needs and wishes of the client tend to be of more limited significance.

When reviewing the vocational rehabilitation services offered by the Manitoba Workers Compensation Board the Committee tried to consider both the agency's ability to gather and manipulate the data necessary to meet its stated goals, as well as its success in balancing sensitivity to individual client needs with cost effectiveness. **Having completed its review, the Committee can only conclude that despite the increase in manpower and costs, the Vocational Rehabilitation Services Department appears to be lacking sufficient technical expertise. Whether as a logical consequence of that deficiency or as a pre-condition for it, the Manitoba Workers Compensation Board has not demonstrated the acceptable balance between management of costs and provision of appropriate and effective rehabilitation services.**

Earlier in this discussion a four-stage schematic of the vocational rehabilitation process was presented. The stages included: i) evaluation/assessment, ii) plan development, iii) service delivery/coordination and iv) job placement. These four stages may also provide a conceptual tool for use in a more detailed analysis of vocational rehabilitation services offered by the Workers Compensation Board of Manitoba.

i) Evaluation/Assessment

The purpose of the professional assessment in vocational rehabilitation is to provide the information necessary to assist the injured worker in setting a practical and realistic vocational goal. The rehabilitation professional then uses his/her expertise to identify and coordinate the delivery of those services required to reach that goal. Therefore, assessment information is essential in the planning process. As Matkin states:

> realistic planning and development of vocational rehabilitation goals begin only after the professional has collected all of the

> necessary client information acquired through the initial evaluation, medical data, and other sources which may include job analysis, vocational and/or psychological assessments, and labor market surveys.[1]

In hearing from injured workers and others, as well as speaking with staff of the Workers Compensation Board and reviewing claim files, the Committee learned that the Workers Compensation Board does not have "in-house" the technology and expertise required for a thorough vocational assessment. Furthermore, it is clear that the expertise which does exist in the community is not used to the fullest possible extent. Since no clear guidelines exist to define what is involved in the assessment, services provided to injured workers tend to differ significantly from case to case.

It is clear that the Vocational Rehabilitation Services Department, in order to live up to its name, must clarify its definition of vocational evaluation. It must also make the effort to locate the necessary technology and expertise in the community and to ensure that service staff is fully informed of available resources. In areas where the necessary expertise is unavailable outside the agency, consideration should then be given to developing it within the Workers Compensation Board.

As has been indicated, the Workers Compensation Board of Manitoba is in the mainstream of rehabilitation service within the workers' compensation context to the extent that services emphasize identification of transferable skills. Rasch defines a transferable skill as, "any client quality, unaffected by the disability, that may have work or re-employment relevance."[2] Subsequently, the rehabilitation professional "identifies, and whenever possible enhances these skills, and relates them to jobs existing in the local labor market."[3] Therefore, in order to define skills as transferable, the rehabilitation agency must be able to relate them to **specific** jobs existing in the **local** labour market. Also, the injured worker's ability to utilize the identified skills or experience must in no way be compromised by the physical limitations resulting from his/her compensable condition.

Matkin describes three common methods for assessment of vocational potential: 1) job analysis, 2) job modification and 3) vocational evaluation. Vocational evaluation has been defined as:

> ... a process of assessment of potential, especially with respect to an individual's optimum potential for vocational functioning, arrived at through a variety of sources, but characteristically through the observation of an individual's behaviour in work-related or work-like activities.[4]

Therefore, in addition to psychometric testing of vocational aptitudes and interests, vocational evaluation provides an analysis of specific behaviours in a work-related setting.

Job analysis is a detailed study of a specific job in a specific setting to define the physical demands, working conditions and the tasks and activities associated with that job. This information may then be compared with available medical information to determine its suitability for the injured worker. As Matkin notes:

> jobs should be analyzed as they exist, rather than relying on written descriptions which may be provided by an employer.... For a job analysis to be specific and useful for effective rehabilitation planning, it should report a specific job as it exists at the time of the analysis not as it should exist, nor how it existed in the past, or how it exists in similar employment situations.[5]

Matkin also states that the injured worker should accompany the rehabilitation professional conducting the job analysis to the work site, "in order to add specificity to the actual duties performed in the course of his or her employment."[6] If this is not possible, subsequent to completion of the analysis the rehabilitation professional should meet with the injured worker to verify the accuracy of the information gathered.[7] Particularly in the United States, job analysis has reached a level of considerable sophistication.

Job modification represents a specific application of job analysis. Work activities are studied, outlined in detail and compared to available medical information to determine whether the disability might require modification of pre-accident duties.

Job analysis and job modification are of particular value in attempting to return injured workers to employment with the accident employer in pre-accident or modified duties. Since the Vocational Rehabilitation Services Department supports return to work with the accident employer as a priority, one would expect emphasis on these techniques. However, while job descriptions are routinely obtained by Vocational Rehabilitation Counsellors, they are not detailed enough to be considered job analyses in the professional sense.

The Committee heard of numerous instances in which job descriptions placed on files were considered inaccurate by injured workers, or in which injured workers were placed in re-employment they felt inappropriate to their medical conditions. We feel that the determination of the suitability of employment duties would be greatly facilitated by professional job analysis. We are aware that assessment by an occupational therapist is a service available to the Vocational Rehabilitation Counsellor. However, this service option appears to be utilized on an occasional rather than on a routine basis. **Since only one occupational therapist at the Manitoba Rehabilitation Hospital currently provides this service for Workers Compensation Board clients, delays in assessments are inevitable. We believe that the Board should seriously consider funding additional positions at the Rehabilitation Hospital to meet the obvious need.**

The lack of emphasis placed on job modification is indicated by the fact that during the one-year period January 1985 to December 1985, the Vocational Rehabilitation Services Department of the Workers Compensation Board spent a total of $1,105 under the expense category of Worksite Modification. This amounted to 0.01 per cent of total expenditures for that period. For the period January 1986 to June 1986, the total amount expended under this category was $810 or 0.02 per cent of total expenditures to June 30, 1986. The Committee is aware that Job Modification involves more than the purchase of equipment or other dollar expenditures. It is possible that a job modification could be undertaken resulting in no dollar cost to the Workers Compensation Board. Nevertheless, the minimal expenditures under this category can only be seen as reflecting insufficient attention and/or a lack of expertise in the area of job modification, of which worksite modification is an important sub-task.

Rasch suggests that the identification of a realistic employment goal, the prime objective of vocational rehabilitation planning, requires:

> the assessment and integration of two separate areas of information. The first of these is information about the client, and the second information about the world of work as it exists in the client's community. Successful vocational rehabilitation always involves a careful assessment and integration of pertinent data from both areas.[8]

Therefore, the rehabilitation professional must have access to information about jobs that exist in the local labour market, the demands of the jobs, and whether or not reasonable opportunities for employment exist. As Rasch also states:

> It is not enough to know that a client could physically and mentally do **Job A**. The rehabilitationist must also know that the client has a realistic chance of being hired for **Job A**.[9]

The identified labour market specialists in the Vocational Rehabilitation Services Department of the Workers Compensation Board of Manitoba are the Re-Employment Officers. However, their involvement generally begins after the re-employment goal has been set, since their mandate is to assist in job placement. The current system does not recognize the importance of labour market information in the goal-setting process. Involvement of a Re-Employment Officer during the early stages of rehabilitation planning in scattered cases reflects the professionalism of the managing Counsellor rather than the normal process of the service system. However, more attention will be given to the function of labour market data in planning in the discussion of plan development which follows.

In summary, we believe that the Vocational Rehabilitation Services Department has not demonstrated that it places sufficient importance on complete and consistent assessment prior to initiating a rehabilitation plan. It is not acceptable to provide assessment services in some cases while not doing so in others. It is the responsibility of the department to provide baseline services to **all** injured workers prior to the establishment of a vocational goal and service plan. **Clearly, all claimants *must* receive, in view of the departments stated goals, a professional job analysis and job modification study to explore the possibility of suitable employment with the accident employer.** Should such employment prove unavailable, psychometric testing around vocational interests and aptitudes should then be undertaken as a basis for the Vocational Rehabilitation Counsellor and the injured worker to begin discussion of alternative employment. In the event of more severe vocational handicaps, a vocational evaluation might then be arranged.

It is also essential that whatever level of assessment service is established as the minimum acceptable, this must *not* be allowed to become the standard of service. Assessment services, like all rehabilitation services, must be case-specific, i.e. they should be used to answer specific questions. The number of questions, and the difficulty attendant on answering them, may differ in each case.

At the present time, the assessment procedures utilized by the Vocational Rehabilitation Services Department of the Manitoba Workers Compensation Board are inadequate and inconsistent. Without adequate assessment, it is not reasonable to expect adequate service provision.

ii) Plan Development

In the United States, the vocational rehabilitation program:

> is developed with the active participation of the client, and the client must sign the plan to indicate review and consent before services are implemented.[10]

The written plan will include the job objective, the services required, service costs, service providers and a time frame. Of course, this occurs within a free market system where services are overseen and approved by third parties.

The American Model has been criticized for a tendency toward rehabilitation services being decided on the basis of cost rather than appropriateness. Nevertheless, authors in the field still assert the primacy of the client in the planning process. Matkin states, "the importance of client participation within an insurance rehabilitation context cannot be stressed enough."[11] The respective roles of the rehabilitation professional and the injured worker are clearly and succinctly stated by that same author:

> Simply stated, the disabled client has the right to choose his or her own vocational goal, and the rehabilitation professional serves as a person whose expertise in a given field assists the client to realistically appraise the goal and facilitate acquisition of it.[12]

In its written materials, the Vocational Rehabilitation Services Department recognizes the need for active involvement of the injured worker in the rehabilitation plan. The draft copy of the department's proposed Training Manual states:

> to the greatest extent possible, Counsellors will involve workers in their own program of rehabilitation, as vocational rehabilitation programs are truly successful if the worker is an active participant in its development.[13]

However, the Committee has found that the vocational goal and service plan generally is quite obviously directed by the Vocational Rehabilitation Services Department and seldom reflects a vocational goal chosen by the injured worker.

It appears clear to Committee members that short-term cost concerns override concern for the injured workers' vocational interests and desires and for their long-term financial interests. We have found the current vocational rehabilitation system within the Workers Compensation Board to be directive and autocratic. As has earlier been indicated, injured workers commonly experience their relationship with the Vocational Rehabilitation Services Department to be overtly adversarial and non-supportive. Injured workers, and others, repeatedly stated to the Committee during public hearings that the wishes of the injured worker were not given priority during rehabilitation planning.

A corollary problem raised with the Committee relates to the locus of decision-making authority within the department. The Committee heard of numerous cases in which an injured worker negotiated a mutually agreeable plan of action with his/her Vocational Rehabilitation Counsellor only to have the plan vetoed at the management level. In the proposed Training Manual, two-and-a-half pages are devoted to the "Duties and Function of the Vocational Rehabilitation Counsellor."[14] However, the description does not suggest that the Counsellor possesses sufficient authority to negotiate and arrange the training plan with the injured worker. The evidence gathered by the Committee during its investigations indicates that, indeed, the Counsellor has limited authority. Since it is the Counsellor who is on the "front line" dealing with injured workers, this lack of authority, or possibility of being overruled at a higher level, places both the Counsellor and the injured worker in an awkward position. The result is often a sense of betrayal on the part of the injured worker, and frustration on the part of the Counsellor.

In private enterprise rehabilitation in the U.S., the Rehabilitation Plan must be accepted by the third party funder as well. However, in that system the rehabilitation plan is drawn up in detailed, written form and acts, in essence, as a contract. The injured worker is advised as to what s/he can expect, and the funder has information regarding time frame and projected costs. **In the Manitoba system, the lack of a written rehabilitation plan leaves the injured worker with no clear expectations of service.** Our experience is that Rehabilitation Plans can change direction with startling rapidity in response to a number of factors internal to the agency, including termination of all services and benefits due to medical reassessment by a Board Medical Officer.

For example, one claimant with bakers' asthma had her retraining program terminated in mid-stream when a Medical Officer determined that any restrictions should have disappeared since her condition was a temporary rather than a permanent one. She believes that the "reassessment" resulted directly from her having complained about the quality of her training-on-the-job program.

For the vocational rehabilitation program of the Manitoba Workers Compensation Board to be a truly professional service, the department must be able to develop a vocational rehabilitation plan based on a thorough and professional assessment which it is willing to accept and approve. The plan should then become a contract between the injured worker and the agency. As an adjudicative decision, it should then become subject to the appeal process in the same manner as any other decision. Once created, the contract should not be subject to change other than any "fine-tuning" which might be required in response to changes in circumstances. Radical and unilateral change of plan direction by the agency, which is now so blatant and so professionally unacceptable, would be minimized.

At the present time, although the Vocational Rehabilitation Services Department purports to assess all plans for cost-effectiveness, the Committee found no evidence that the department possesses the expertise to evaluate service proposals on this basis. Without such expertise, decisions about cost-effectiveness are merely arbitrary and may be susceptible to the pressures of internal ideologies. Of course, the concept of cost-effectiveness involves the balancing of cost against desirable outcomes. Therefore, in order to determine whether money has been or will be effectively spent, the desired outcomes must be known. It would seem reasonable to assume that given its approach, which reflects the "Marketing" or "Placement" Model of rehabilitation service, the desired outcome of rehabilitation service for the Manitoba Workers Compensation Board would be re-employment. However, as will be shown, little hard evidence exists to indicate that this is, in fact, the case.

In addition, as indicated previously, appropriate planning, including the specification of the re-employment goal, requires considerable information related to the local labour market. In the Vocational Rehabilitation Services Department of the Manitoba Workers Compensation Board, the identified labour market experts are the Re-employment Officers. Despite this, the Re-employment Officers are not encouraged under the current system to become involved in cases during the planning and goal-setting process. Therefore, the responsibility for the planning process falls on the Vocational Rehabilitation Counsellor who is not expected to be a labour market expert.

The expectation that Re-employment Officers are appropriately used only in placement activities reflects on the part of administration a lack of understanding of the rehabilitation planning process and of the information critical to it. As noted elsewhere, there is a lack of flexibility in encouraging the use of appropriate external expertise and resources at the appropriate juncture in the service process. This often inappropriate linearity is also reflected in the relationship between the Claims and Rehabilitation Departments, in which files travel back and forth becoming the "property" of the departments until transferred. The Committee has encountered numerous examples of the problems with this lack of coordination which makes the timing of interventions on the basis of appropriateness largely impossible. The inability of a rehabilitation services department to time its interventions undermines the entire foundation of the vocational rehabilitation process.

In summary, we feel that in the area of program planning and vocational goal identification, the services offered by the Manitoba Workers Compensation Board are inadequate. Part of this inadequacy results directly from the lack of fully developed assessment and evaluation technologies, as previously discussed. However, there are also significant problems of philosophy or orientation.

For example, it is our perception that the injured worker is insufficiently involved in determining the vocational goal. Although this may differ from case to case and Counsellor to Counsellor, it is clear that planning is generally directed by the Vocational Rehabilitation Services Department and reflects its priorities rather than reflecting the interests and desires of individual injured workers. The Committee has noted that this locus of authority can result in abrupt changes in the direction of planning in short periods of time.

However, although the locus of authority for deciding the vocational goal lies with the department, the authority of the Vocational Rehabilitation Counsellor is, ironically, unclear. This situation often results in frustration for injured workers who have negotiated in good faith with Counsellors only to find the plan vetoed at a higher level.

Written rehabilitation plans would, in our opinion, provide injured workers with some sense of security and lessen the current atmosphere of mistrust and apprehension which is so prevalent. Such plans, if properly constructed, could also provide information to address issues of cost effectiveness. They would also encourage Counsellors to explore community resources to develop client skills toward the mutually developed vocational goal.

The critical flaw of the system at present is that the injured worker is a third party to his/her own rehabilitation. This form of directive, autocratic service delivery doesn't work.

iii) Service Delivery and Coordination

Ideally, this stage should following logically from the previous two in that the services provided should be those necessary to enhance the skills required by the injured worker to meet the identified vocational goal. In the professional literature, Vocational Rehabilitation Counsellors are generally characterized as coordinators of service, making use of whatever appropriate expertise may be available. Although similarities will be inevitable, the services provided should be tailored to the individual needs of the claimant and the individual requirements of each specific rehabilitation plan.

A review of expense data provided by the Workers Compensation Board of Manitoba shows approximate percentages of total departmental expenditures for various categories of service. For example, during the period January 1986 to June 1986, the largest categories in terms of monies expended were:

1)	Job Search	26%
2)	Counselling	21%
	Wage Loss	15%
	Wage Replacement (Special Additional Compensation)	13%
	Institutional Training	9%

Over one-quarter of total expenditures during this period were toward payment of expenses associated with job search. Whether this amount is reasonable depends upon outcomes, i.e. the number of successful re-employment placements at or near the pre-accident wage level. The success of rehabilitation services in this regard will be discussed in the section on Job Placement.

However, this statistic is interesting in light of the common complaint to this Committee from injured workers, labour representatives and even some employers and health professionals, that the Vocational Rehabilitation Services Department places a serious overemphasis on job search activities compared to retraining, both academic and training-on-the-job. The Manitoba Federation of Labour stated this criticism, and its description of the consequences, in its brief to the Committee. An excerpt is provided:

> Training or upgrading should receive greater emphasis. It is not enough to secure just any job, it must be a productive and meaningful one. The present practices of the W.C.B. are such that a worker is often forced into a minimum wage job through the Job Search Program and the W.C.B. pays a wage supplement to make up for wage loss rather than pay for retraining. There have also been many cases of workers remaining on total temporary disability benefits for years during which time a training program could have been completed and the worker re-employed. This illustrates that the W.C.B. is not, in fact, saving money by not sponsoring workers in training programs.[15]

Certainly the 26 per cent expended for Job Search vs. the 9 per cent for Institutional Training, supports the contention of greater emphasis on job search. The criticisms from the Federation of Labour regarding type of job placement will be dealt with later. However, the statement actually contains two criticisms:

1) the re-employment goals are inappropriate and
2) service provision is inadequate.

The Committee, as a result of its review and investigation, agrees that the rehabilitation services currently provided are not generally adequate and reflect an unacceptable emphasis on job search over other programs. Since re-employment is the eventual goal of vocational rehabilitation, job search activities are essential. However, we are aware of too many cases in which injured workers were placed on active job search without adequate assessment and evaluation or even determination of a clear re-employment goal. The Committee does not have statistics related to the average duration of job search activities because the Workers Compensation Board could not provide these numbers. However, we are aware of cases in which injured workers have been engaged in job search activities for over one year without success. We believe that this is a clear indication of inadequate assessment, plan design and service provision. When job search is not the endpoint of a clearly and rationally developed rehabilitation process, it is simply an abrogation of responsibility. Also, since job search, particularly without a clear goal in mind, is an aversive activity, demand for job search in the absence of other service may be worse, i.e. more damaging to the injured worker, than providing no service at all.

It is ironic that while the Vocational Rehabilitation Services Department states that "training on the job ... is considered the preferred method of retraining,"[16] only 3 per cent of total budget for the 1986 calendar year was expended under this expense category.

Critical to the success of the client-directed job search, in addition to a defined re-employment goal, is the readiness of the injured worker to return to employment. As Matkin suggests, this concept of readiness addresses a spectrum of concerns ranging from skills to psychological/emotional issues. The readiness criteria he advocates be met by clients **prior** to implementation of a job search include:

1. An individual must be able to pick an occupation that is likely to be satisfying.
2. The individual must possess all of the skills and qualifications required of workers in his or her chosen occupation.
3. The individual must be able to perform an effective job search.
4. The individual must be able to demonstrate attitudes and behaviors congruent with the expectations of employers.
5. The individual must be able to cope with personal issues such as transportation, care of dependents, physical disabilities, and others in order to be ready and able to succeed on the job.[17]

The items listed are addressed during the process of a professional vocational rehabilitation program in a variety of ways. Item 1 should grow from the assessment process, which would include psychometric testing and possibly vocational evaluation. Item 2 should grow from a thorough evaluation of transferable skills and local labour market patterns, plus whatever skills upgrading or retraining may be indicated. Item 5 falls into the area of counselling, which may be provided by the case manager or on a referral basis.

However, items 3 and 4 relate to what has come to be called "job search skills training." As Rasch states unequivocally:

> Job-seeking skills training is the cornerstone of client-centered placement. Even in selective placement where the rehabilitationist locates the job openings, the client must still present him or herself effectively in an employment interview.[18]

One very successful model is the Job Club model of Besalel and Azrin, which includes cooperation in job search activities with the teaching of specific skills such as interview techniques, completion of applications, resumes and covering letters, etc.

Although the Vocational Rehabilitation Services Department of the Manitoba Workers Compensation Board runs its own Job Finding Club based on the Azrin/Besalel Model, referral is fairly selective and the program is not made available to all clients of the department.

For the numerous reasons previously explained, we do not believe that the majority of injured workers placed on job search by the Workers Compensation Board of Manitoba could meet the readiness criteria provided by Matkin.

In summary, available evidence suggests that at the stage of service delivery and coordination, the Manitoba Workers Compensation Board lacks success as it does in the earlier two stages.

On the basis of available data and information presented at public hearings, it appears that the problems described with service provision reflect organizational decisions made on the basis of short-term cost savings. We believe that the Vocational Rehabilitation Services Department places undue emphasis on client-centered job search activities without sufficient assessment or identification of a realistic and *specific* re-employment goal. In addition, job search is clearly utilized to the exclusion of other programs which may be more appropriate. For example, available statistics indicate that formal institutional retraining is comparatively underutilized. Additionally, despite the Board's stated priorities, training-on-the-job is a resource which has been left virtually untapped.

The emphasis on client-directed job search activities might be marginally more defensible were there strong evidence of successful outcomes, i.e. successful re-employment. However, such evidence simply cannot be produced, as will be discussed in the following discussion of job placement. Also, one must always be aware that definitions of successful job placement tend to reflect philosophical and ideological presumptions as well as any limitations by the data base.

iv) Job Placement

Job placement is the goal of all vocational rehabilitation planning. Vocational rehabilitation services exist to assist clients toward this end. Therefore, unless s/he does not complete the steps contained in the plan, every worker will eventually find him/herself conducting an active job search. Ideally, however, the job search should be the final activity in the rehabilitation plan, and the job seeker should have a specific re-employment goal and have been provided with all the necessary skills required to obtain and maintain the identified job.

Its written materials make clear that the Vocational Rehabilitation Services Department of the Manitoba Workers Compensation Board operates under the client-centered model of job search. Client-centered job search requires injured workers "to assume the major responsibility for securing job leads, and for performing the necessary follow-up activities."[19] However, the professional literature makes clear that the responsibility of the rehabilitation agency remains to instruct the client in "all the major factors related to successful job seeking."[20]

The Procedure Manual of the Vocational Rehabilitation Services Department addresses the need for adequate training in job search skills as well as the concept of job readiness, in terms not significantly different from the professional literature related to insurance and workers' compensation legislation in the United States. Unfortunately, it is clear that there exists a large gap between the rhetoric and the realities of service.

The Committee is aware of cases in which the payment of benefits for job search purposes was the primary "service" provided. As indicated earlier, it is our opinion that too many injured workers are placed on an active job search with insufficient assessment and preparation and with an ill-defined re-employment goal. This situation reflects the problems of the total rehabilitation process within the Workers Compensation Board. It may also reflect a system which has placed concerns about cost before concerns about professional program and service. However, if this is the case, it appears from the rather incomplete data available that the efforts to date have resulted in ongoing cost increases rather than decreases.

The "Placement" or "Marketing" Model of vocational rehabilitation, upon which the Manitoba Workers Compensation Board has apparently modelled itself (at least in its written objectives), has as its primary focus the re-employment of injured workers. As Cassell and Mulkey described, the Marketing Model is a model which grew popular in the United States in the 1960s. It reflects an economic reality characterized by excess supply and high unemployment. It is a consumption model with injured workers as products and employers as customers. Consequently, service is focussed on readying the client to be competitive in the labour market. Therefore, this service model demands expertise in labour market analysis and assessment of employment-related client traits to allow for matching of client skills to existing employment positions in the local labour market. Effectiveness is measured by the quantity of successful placement.[21]

The data base currently utilized by the Vocational Rehabilitation Services Department makes an analysis of outcomes difficult. The system, which is still in its infancy, tends more toward a process rather than an outcome orientation, i.e. toward an analysis of the number of "units" flowing through the system rather than the results of the process. However, the information which is available suggests that if, indeed, the Manitoba Workers Compensation Board is adopting a Marketing Model of rehabilitation, there has been a failure in implementation.

Available statistics reveal that during 1985 and 1986 approximately 23 per cent of all vocational rehabilitation expenditures were made under the categories related to job search. This was the largest expense category in both years totalling approximately $2,350,000 in 1985 and $2,529,000 in 1986. Wage losses paid total approximately 16 per cent of total rehabilitation expenditures in 1985 and 17 per cent in 1986, costing about $1,600,000 and $1,800,000 for each year respectively.

Comparatively, the total percentages of expenditures for training-on-the-job for 1985 and 1986 were 2.4 per cent and 3 per cent (approximately $240,000 and $335,000). Institutional retraining was funded to the extent of 11 per cent ($1,100,000) and 9 per cent ($962,000) of total expenditures in 1985 and 1986 respectively.

During 1986 a total of only 361 client files were closed due to a return to work without a loss in wages. Another 390 were closed during that period for a variety of other reasons. Some of these 390 may have returned to work. However, the current data base does not allow this distinction to be made. Nevertheless, with this caveat in mind, it can be projected that approximately 30 injured workers per month returned to work without a subsequent wage loss during 1986.

It should be noted that of the 361 injured workers, 269 (or approximately 36 per cent) returned to work with the accident employer. Eighty-nine (or approximately 12 per cent) returned to work with a new employer. Finally, three (or approximately 0.4 per cent) entered a job without wage loss following completion of training-on-the-job.

It must be remembered that the above are only closure statistics and do not provide an accurate reflection of employment placement overall. For example, statistics provided by the Vocational Rehabilitation Services Department show that for the 12 months of June 1985 to June 1986, Re-employment Officers placed an average of 33 injured workers per month in employment (including direct placements, training-on-the-job positions and work assessments). Therefore, most injured workers placed in employment suffer a loss of wages compared to pre-accident duties. Since these files remain open while in receipt of wage loss supplementation, these placements cannot be projected from the closure statistics.

What can be learned from this avalanche of statistics? **It is obvious that the Vocational Rehabilitation Services Department is spending significant sums of money on job search activities and wage loss. Of course, this is exactly what would be expected in view of the problems previously described. Job search activities will inevitably be prolonged and consequently costly when, as has been described, assessment is inadequate, vocational goals are vague and skills training is unreliable. These same inadequacies will also**

FIGURE 3

WCB REHAB DEPARTMENT CASE CLOSURE STATISTICS — 1986

"SUCCESSFUL REHABILITATION"

MONTH	RTW ACC ER (01)		RTW NEW ER (02)		TOJ AND RTW (21)		SUB TOTAL	
	#	%	#	%	#	%	#	%
1st 6 months	124	32.8%	38	10.1%	2	0.5%	164	43.4%
2nd 6 months	145	38.9%	51	13.6%	1	0.3%	197	52.8%
12 month Total	269	35.8%	89	11.9%	3	0.4%	361	48.1%

UNILATERAL TERMINATION

MONTH	TRANS. SKILLS JOB SEARCH ENDED (20)		"NO REHAB WARRENTED" (31)		CLAIMS DEPT. TERMINATION "RECOVERED" (41)		CLAIMS DEPT. TERMINATION "NON-COMP"(50)		"NON-CO-OP" (60)		"UNAVAILABLE FOR REHAB" (80)		SUB TOTAL	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
1st 6 months	13	3.4	51	13.5	40	10.6	14	3.7	27	7.1	37	9.8	182	48.1
2nd 6 months	11	2.9	32	8.6	39	10.5	8	2.1	25	6.7	31	8.3	146	39.1
12 month Total	24	3.2	83	11.1	79	10.5	22	2.9	52	6.9	68	9.1	328	43.7

OTHER

MONTH	INSTITUTIONAL TRAINING (22)		LUMP SUM REQUEST (23)		ATTENDANT'S ALLOWANCE ONLY (24)		CLOTHING ALLOWANCE ONLY (25)		SPECIAL ADDITIONAL REVIEW ONLY (26)		DECEASED (70)		RETIRED (90)		SUB TOTAL		MONTHLY TOTAL	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
1st 6 months	2	0.5	0		0		0		1		6	1.6	23	6.1	32	8.5	378	100
2nd 6 months	3	0.8	1	0.3	0		0		1	0.3	6	1.6	19	5.1	30	8.1	373	100
12 month Total	5	0.7	1	0.1	0		0		2	0.3	12	1.6	42	5.6	62	8.2	751	100

inevitably lead to under-employment and inflated ongoing wage loss expenditures.

As mentioned earlier, it is difficult not to assume that the emphasis on job search reflects efforts to "keep the lid" on costs. Also, when approximately 44 per cent of files closed during a 12-month period (see Figure 3) reflect termination of benefits prior to a return to work, it suggests that the primary aim of the system is file closure rather than job placement. Of course, we are aware that the Vocational Rehabilitation Services Department occupies the "tail end" of the compensation process and is, therefore, forced to deal with the results of inadequacies in claims adjudication. However, while the Committee realizes that a reform of the vocational rehabilitation system of the Workers Compensation Board would be impossible without major changes elsewhere in the organization, we nevertheless believe that program and service decisions should not be contrary to the philosophy of professional practice. With regard to the vocational rehabilitation program offered by the Workers Compensation Board, this is clearly the case.

The Workers Compensation Board does not always provide appropriate service, and has expended significant sums without demonstrating a corresponding level of successful outcomes. No system in the real world could be expected to return every client to work without a wage loss. However, proper service can and does minimize long-term costs as well as providing appropriate and satisfying re-employment opportunities for clients. **As long as the Workers Compensation Board substitutes job search activities for programming and continues to underutilize appropriate retraining opportunities, both academic and training-on-the-job, it will continue to experience the escalating costs and client dissatisfaction resulting from underemployment and inappropriate job placement.**

IV. OTHER ISSUES

1) Early Intervention

An important element of the free market rehabilitation system in the United States is the emphasis by rehabilitation professionals on early intervention. Rasch calls these early intervention activities vocational management, as distinct from vocational rehabilitation. He asserts that vocational rehabilitation refers correctly only to those activities required when an injured worker is unable to return to work with the accident employer in pre-accident or alternative duties, and must seek a different job with a different employer. Therefore, while vocational rehabilitation is a restorative service, vocational management is preventative in that it aims at stopping or minimizing the effects of the compensable condition on the employment situation.[22]

This usually involves beginning negotiations with the accident employer, even before the injured worker has reached a plateau in his/her medical condition, regarding the injured worker's eventual return to work in the original, alternate or modified duties. The rehabilitation professional generally obtains a detailed job analysis of the worker's job at the time of injury, as well as other jobs at the work site. S/he must also maintain an ongoing knowledge of the client's medical condition and the physical restrictions recommended, as well as open communication with the employer. As Rasch states:

> When vocational management is successful, the client returns to the former employer in the same modified, or new position at the earliest possible time. The impact of the injury on the vocational sphere of the client's life is accordingly kept to a minimum.[23]

Despite apparent agreement with the priorities of the U.S. private-sector model of rehabilitation, and statements from management and administration representatives of the Workers Compensation Board about the value of early intervention, very little such intervention currently takes place. There are a number of reasons for this, including:

1) the lack of a team approach, which mitigates against rehabilitation involvement until the Claims Department is "finished" with the file,
2) large caseloads in the rehabilitation department, exacerbated by excessive paperwork demands and responsibility for ensuring ongoing benefit payments, and
3) the absence of a coherent model including the purpose and goals of early intervention.

Under the present system, it is extremely difficult for a Vocational Rehabilitation Counsellor to provide meaningful early intervention since there are too many factors beyond his/her control and jurisdiction. Those files which are referred on this basis generally receive little service. The separation of the Claims and Rehabilitation Departments makes the judicious timing of early intervention difficult. The result is that injured workers often remain in the system for months or even years without any supportive or prevocational counselling to assist them in adjusting to the life changes caused by the compensable condition or to begin thinking about an eventual return to work.

It is not surprising that by the time their files reach the Vocational Rehabilitation Services Department, many injured workers are angry and frustrated and have often lost the initiative to pursue re-employment. **By paying injured workers to be disabled without providing vocational rehabilitation services early in the life of the case, the Workers Compensation Board reinforces the worker in the sick role and undermines his/her ability to be successful in rehabilitation when the opportunity finally arrives. The non-supportive and directive style of vocational rehabilitation programming provided by the Workers Compensation Board does not result in the kind of environment in which successful rehabilitation is likely to take place.**

Early intervention not only assists injured workers in returning to employment with a firm with which they are familiar, it also saves costs for both the employer (who does not have to train a new employee who is not fully productive for some time) and for the rehabilitation agency in terms of the costs of retraining and/or wage supplementation. **However, it is unlikely that effective early intervention at the Workers Compensation Board will be realized until the function and goals of the process are understood by those in charge, until workloads for Vocational Rehabilitation Counsellors are manageable, and until the organization is restructured to allow a cooperative, "team" approach to file management.**

2) Relocation

In its report, Guidelines for the Seventies, the Government of Manitoba outlined what it called "the stay option" which described a commitment to rural communities, including the development of adequate services, in order to avoid forced migration to larger urban centres, by providing sufficient opportunities in all areas of life.[24]

The Workers Compensation Board's Vocational Rehabilitation Services Department, however, operates under policy which contradicts both the letter and the spirit of the government's philosophy regarding rural Manitoba. The Procedure Manual for that department indicates that consideration may be given to relocating injured workers to a "major centre" in the event that "such a move will significantly increase the opportunity to procure alternate work."[25] Reluctance on the part of injured workers to move can and has been used as an indicator of non-cooperation, sufficient to result in the interruption or termination of benefits. This policy ignores the fact that the injured worker is living in the rural area by choice. It also assumes that the Workers Compensation Board has the right to make decisions for a family because one spouse is in receipt of benefits.

It is, no doubt, often frustrating to try and deliver adequate and appropriate service in a rural area with a limited local job market, particularly with a centralized agency. However, we are in agreement with the government's commitment of service to rural Manitoba. It is clearly time that the Workers Compensation Board began to explore how best to reach out to injured workers in rural Manitoba rather than trying to transform them by force into urbanites. The current policy of terminating the benefits of some rural and northern workers who do not want to relocate to Winnipeg serves only to extend existing regional disparities. Also, in view of the current inadequacies inherent in the vocational rehabilitation services provided by the Workers Compensation Board, it is doubtful that the agency is able to assess the situation adequately to meet its own criteria for relocation.

We believe that the Workers Compensation Board should be moving toward a decentralization of services through the location of offices throughout the province, each having sufficient personnel and authority to adjudicate claims, pay benefits and provide rehabilitation services. Also, the agency must begin providing rural injured workers with the necessary skills, through academic retraining, training-on-the-job or any other appropriate means, to secure meaningful employment in or near their home areas. The current practice not only undermines the rural areas but places increasing pressure on the labour markets of the larger centres.

However, we fully support assisting an injured worker in relocating when s/he wishes to do so for an employment opportunity or to improve employment options. Relocation may be suggested as an option in vocational rehabilitation planning. We do not believe, though, that the Workers Compensation Board has the right to demand it as a condition for service and/or the continuation of benefits, particularly since the government of the province has asserted its commitment to maintaining rural lifestyles and population.

3) Holidays and Illness While in Receipt of Rehabilitation Allowance

Under current departmental policy, injured workers receiving benefits through the Vocational Rehabilitation Services Department are not allowed to take "time off" for holidays. Or, to be more accurate, they can take holidays, but the department suspends benefits for that period.

The reason given for this policy is that since the injured worker is not available for involvement in rehabilitation planning while on holidays, s/he is not entitled to benefits.

We believe that the blanket application of such a policy is questionable. In many cases, injured workers have suffered serious injury or illness followed by a long period of recuperation and recovery. Such circumstances are often a severe strain on marital and family relationships. To deny any opportunity for holiday time while on rehabilitation allowance can exacerbate stress on injured workers, as well as on the family relationships.

We are aware of a tendency of the Vocational Rehabilitation Services Department to implement blanket policy which effectively limits the ability to tailor the rehabilitation plan to the injured worker's individual circumstances. However, this flexibility is one of the major features of true rehabilitation. The Vocational Rehabilitation Services Department of the Manitoba Workers Compensation Board, by enacting policies such as that described above, limits the appropriate responsibility of the case manager, in this case the Vocational Rehabilitation Counsellor, to create an **appropriate** rehabilitation plan. One suspects that the administrative work required to interrupt benefits and the obvious ill will created overrides any minor financial benefits which might be created. In summary, the current policy is inflexible and restrictive and does not positively contribute toward successful rehabilitation.

Similarly, the current departmental policy of interrupting benefits during periods of short-term illness is also unacceptable for similar reasons. Of course, the department will have to adjudicate in cases where an injured worker may be unavailable for several weeks or months due to a non-compensable condition, just as it would with regard to a request for time off for holidays. **However, it is our strong opinion that it is the job of the Workers Compensation Board to make such decisions, i.e. to adjudicate, and it is the purpose of vocational rehabilitation to provide service responsive to individual circumstances *and to provide all supports necessary to facilitate success.* These responsibilities cannot be abrogated through policy.**

4) Statistics

As has been earlier noted, the statistical formats currently in use by the department do not facilitate a critical review of "success" or the ongoing costs of programs. Although we are aware that the data base is still in the developmental stages, it cannot be too strongly stated that the formats currently in use do not provide management and administration with information critical to program and service planning.

There is no use in pretending that the availability of money does not affect programs. In this respect the Workers Compensation Board is no different than any other service agency. However, our analysis of the current vocational rehabilitation services indicates that since the data base is inadequately developed, decisions appear to be made on the basis of apparent short-term cost savings rather than long-term cost considerations.

In addition, without sufficient data, appropriately formatted, issues of quality of service are difficult to impossible to address. In social services, "quality service" and "success" are difficult to define. We have suggested that one critical indicator of success in vocational rehabilitation is job placement, ideally without wage loss. Therefore, placement numbers and wage loss figures can provide over time, an indicator of the effectiveness of service.

The indicator which is currently very difficult to generate is duration. For example, if a client has been engaged in an active job search for more than one year, there is clearly something wrong with the rehabilitation plan. The case manager should be able to access immediately information regarding the length of time a client has remained in a certain service category, in order to monitor service on an ongoing basis and make changes as necessary. Departmental management should have access to the same information in order to monitor the **program** on an ongoing basis, also making changes as necessary.

Statistics, when adequately formatted, provide information critical to evaluation and planning, both on a long- and a short-term basis. They encourage effectiveness and accountability by reflecting both quantitative and qualitative indicators. Our experience with the statistics, currently generated on a routine basis by the Vocational Rehabilitation Services Department, is that they are inadequate in all of the areas noted.

For reasons discussed, we believe that the Workers Compensation Board must develop a data base which can provide information on a routine basis to review the key outcomes of vocational rehabilitation programming:

1) **the number of clients completing rehabilitation programs**
2) **the length of programs**
3) **the number of people returning to work at pre-accident wage**
4) **the number of people returning to work with wage loss, and the amounts**
5) **the cost of the rehabilitation programs.**

The data system should be able to relate the various factors in such a way as to relate costs to outcomes and, thereby, provide direction in policy and program development. Counsellors should also have immediate access to information necessary to case management. The information will be essential if services are to be provided on the basis of individualized written rehabilitation plans, including projected time frames and costs of service.

V. RELATIONSHIPS WITH OTHER DEPARTMENTS

1) Claims Department

As earlier indicated, during the time that injured workers are considered "totally disabled," they are the responsibility of the Claims Department and are paid benefits by that department. When deemed fit for some sort of suitable employment, responsibility (including payment of benefits) is transferred to the Vocational Rehabilitation Services Department. The manifest drawbacks of the current system have been outlined earlier in this Report.

In order for the Workers Compensation Board to provide true vocational rehabilitation services, the existing territoriality between the Claims and Rehabilitation Departments must be eliminated to avoid the "your file, my file" syndrome which now fragments the compensation process and removes the opportunity for the timing of appropriate rehabilitation interventions. There is no reason why rehabilitation services must be at the "back end" of the process when, in many cases, an appropriate involvement shortly after acceptance of the claim would facilitate rehabilitation and significant cost savings.

Moreover, Vocational Rehabilitation Counsellors currently find themselves devoting a majority of their time to matters related to the payment of benefits. This not only detracts from concentration on rehabilitation but may also undermine the process. It is not easy for the injured worker to cast the Counsellor in the helping role when s/he also is perceived as holding the purse strings. It can be argued that responsibility for benefits should remain with the persons designated as adjudicators, in this case the Claims Officers. Vocational Rehabilitation Counsellors would then be available to concentrate on providing their expertise toward returning injured workers to suitable employment as quickly as possible.

2) Finance Department

The difficulties discussed previously, with regard to the relationship of the Claims and Finance Departments, are equally applicable here.

3) Medical Aid

The concerns of this Committee regarding the status of Medical Aid as a line department with adjudicative authority have been discussed elsewhere in this Report. **In our opinion, the Vocational Rehabilitation Services Department should have the authority to authorize expenditures which the department feels are necessary to the process of rehabilitation. The existence of another adjudicative level involved in this process merely serves to undermine the appropriate authority of the rehabilitation specialists.**

4) Medical Department

Medical Officers at the Workers Compensation Board generally perform two functions directly related to cases in receipt of rehabilitation services:

1) reviewing the recommended physical restrictions
2) providing opinions re: the suitability of jobs based on job descriptions and recommended physical restrictions.

It is not unusual for benefits and services to be terminated after an injured worker has been in the system for several years following the lifting of restrictions by a Board Medical Officer. In fact, during 1986, 10.5 per cent of all rehabilitation cases closed were closed following the decision that the injured workers had recovered from the compensable injury or condition. Although some of these cases were, no doubt, cases in which temporary restrictions had initially been assigned (the number of which is unavailable), many others are cases such as those described above who had been "on compensation" for a long time, and were at the time of termination receiving benefits and services through the Vocational Rehabilitation Services Department.

That such cases arise casts significant doubt on the appropriateness of the adjudication process. However, more importantly, it also adds to the sense of insecurity felt by injured workers in dealing with the Workers Compensation Board, and particularly the Vocational Rehabilitation Services Department. Not only does the governing legislation not specifiy any entitlement to benefits or services, but many injured workers have learned that it is possible to spend years in the system only to be "adjudicated out" in the midst of an active rehabilitation plan. These situations (which result not only from policies and practices of the Rehabilitation and Medical Departments but also the Claims Department) are in our view not acceptable. The Workers Compensation Board must live by the decisions it has made. **It is, in our opinion, unfair to make the injured worker bear the conse-**

quences of the apparent inability of the system to make adequate adjudicative decisions. Therefore, once an injured worker has been accepted for rehabilitation services on the basis of a permanent disability, we feel that it should not be possible to terminate benefits prior to completion of the rehabilitation plan on the basis of a later medical opinion.

Our concerns regarding the Medical Officers providing opinions about the suitability of specific jobs, relates to concerns previously described regarding the lack of professional job analyses upon which such opinion might be based. **Without sufficient information about job tasks, the Medical Officer's opinion, which can result in termination of benefits for non-cooperation in the event of refusal by the injured worker, may be very different from one which considered all aspects of the job duties. The opinion of the Medical Officer, no matter how competent, can only be as good as the information upon which it is based.**

5) Non-Cooperation

The Concise Oxford Dictionary defines cooperation as "working together to the same end." Synonyms suggested by the New American Roget's College Thesaurus include alliance and co-partnership.

One reason cited in the interruption or termination of Rehabilitation Allowance benefits by the Vocational Rehabilitation Services Department is non-cooperation. This Committee has serious reservations about the Department's understanding and use of this term.

The concept of cooperation is based on the existence of shared goals and partnership. Our discussions with various constituencies, as well as our review of current rehabilitation policy and practice, indicates that in reality the client's expressed goals may be, and often are, overridden by the Vocational Rehabilitation Services Department which has the final authority to determine the re-employment goal and the services to be provided (if any) to reach that goal.

If someone is told to do something which s/he believes to be unreasonable, and balks at doing so, is that person being uncooperative in the true sense of the term? **Since there is no shared goal or relationship of equal authority, we would suggest that the use of the term non-cooperation is inappropriate in this context. It has already been stated that in the opinion of this Committee, the injured worker receiving vocational rehabilitation services through the Manitoba Workers Compensation Board usually has little input into planning, including the vocational goal. In such circumstances, cooperation/non-cooperation are foreign concepts. The issue is, more accurately, one of obedience or disobedience, since these concepts recognize the realities of the injured worker's relationship to the Board.**

All of the Committee members recognized the need for the Vocational Rehabilitation Services Department to be able to close files of injured workers who refuse to engage in cooperative planning toward an appropriate vocational goal, or who attempt repeatedly to derail a plan which has been cooperatively designed, in order to avoid a return to work. However, we would suggest that in a system sensitive to the needs and aspirations of injured workers, such cases would be relatively rare. Unfortunately, at the present time the Vocational Rehabilitation Services Department is heir to many of the negative consequences of inadequacies in the system as a whole, which it further compounds by rejecting the generally accepted philosophy and practice of vocational rehabilitation.

A directive, non-supportive system has no reason to be surprised if many of its clients are resistant. True rehabilitation recognizes the need of human beings for self-respect. Self-respect is not likely to be developed through demands to do what one is told on the threat of termination of income. This situation simply creates a feeling of powerlessness and anger. We would suggest that many of the clients who, from the perspective of the Vocational Rehabilitation Services Department, are "non-cooperative" may be taking actions, however inappropriate, to preserve what remains of their self-respect and efficacy in the face of what they perceive to be an arbitrary and bureaucratic system.

We believe that before non-cooperation can be used as a reason for the termination of benefits, the Vocational Rehabilitation Services Department must be able to demonstrate that the opportunity for cooperation exists. Otherwise, there is not merely poor vocational rehabilitation, there is no vocational rehabilitation at all, since cooperative planning is central to the very concept. The refusal to "follow orders" and submit to a plan which in the mind of the injured worker may be inappropriate, unrealistic, or degrading is understandable.

In a discussion of motivation in vocational rehabilitation, the following observations were made:

> ... [c]lients who are guided to accept ownership of the rehabilitation program established to assist them will also gain more from this internal orientation format. If clients are able to identify a planned service strategy as **their** program, if the clients take pride in the progress and achievements made in their rehabilitation program

> then motivation is built-in. The often-stated unmotivated client syndrome is averted.
>
> Clearly more personal control is established if motivations are based upon identification and not the carrot or the stick.[26]

This Committee has heard the Workers Compensation Board's perception of the widespread nature of the "unmotivated client syndrome." From injured workers and their representatives, on the other hand, plus investigation of select files, the Committee has learned about "the stick." We believe that the former is the direct result of the latter, and that the situation will change only with a commitment to the philosophy and practices of vocational rehabilitation.

6) Termination of Benefits Prior to Return to Work

Available statistics indicate that during 1986 the Vocational Rehabilitation Services Department closed 24 files under the category "Transferable Skills: Job Search Ended," and only five under the heading "Institutional Training Completed." Under current policy, injured workers who are considered to have suitable "transferable skills" to allow them to obtain alternate employment at their pre-accident income, are provided a maximum eight weeks of benefits for job search purposes. They will also be referred to a Re-employment Officer for assistance in job search, and may be referred to the Department's Job Finding Club. Similarly, injured workers who have completed an approved course of academic/institutional training, receive a maximum of eight weeks benefits for job-search purposes as they are considered, on the basis of their training, to have obtained the necessary transferable skills.

We have a variety of concerns regarding these policies, particularly as they appear to be based on assumptions which the Vocational Rehabilitation Services Department would, in our opinion, be hard-pressed to prove. The first of these is that the department possesses sufficient expertise to **demonstrate** that skills, whether or not they have been gained through retraining, are indeed transferable to the local labour market. **Without the ability to provide empirical verification, the assignment of transferable skills and the limitation of benefits and services on that basis is merely arbitrary. The Department further avoids one avenue currently available to them to judge the validity of their assessments—i.e. success in locating suitable employment at the pre-accident income level—by not providing any follow-up.**

We are of the opinion that if appropriate rehabilitation service has been provided, including the use of professional technologies for the assessment of transferable skills, the period of time between identification of transferable skills and/or the completion of authorized training will be relatively short in most cases. **We believe that the Vocational Rehabilitation Services Department has the responsibility to continue services and benefits *until such time as the injured worker has returned to permanent employment*, or until the file is closed and benefits terminated for *clear* cause.**

Presently, injured workers who have services and benefits terminated after eight weeks of job search, may apply to the Department for wage loss supplementation if and when they locate employment deemed suitable by the Department, but at a lower wage than they earned prior to the compensable injury or condition. However, injured workers are not, as a matter of practice, informed of this policy prior to termination, since the agency feels that the availability of wage loss might act as a disincentive to the workers' efforts in the job search. Therefore, some workers may not apply for wage loss supplementation following return to work, and may suffer an ongoing wage loss, since they do not know they are eligible.

Again, we feel that the Vocational Rehabilitation Services Department must continue benefits and service to the injured worker until s/he has returned to work or until the file has been closed for cause. The Committee's recommendations regarding wage loss are provided elsewhere in this Report.

The current system is unfair. In addition, it suggests that the Department does not have sufficient faith in its retraining plans and identification of transferable skills that it is prepared to stand behind them by continuing benefits until the "expected" re-employment takes place.

7) "Deemed" Wages

Current policy allows the Vocational Rehabilitation Services Department to calculate wage loss supplementation and special additional compensation when considered appropriate, on the basis of an amount the injured worker is "deemed" capable of earning. A common example is that of the injured worker in a rural area whose deemed capability to earn minimum wage is used as the basis for calculation of Special Additional Compensation, based on the assumption that s/he could perform such duties were they available in the rural area, or if s/he moved to a larger urban centre where such duties are presumed to be available.

Another use of deeming of income occurs in cases in which an injured worker obtains employment at a certain wage, and subsequently loses the job for reasons not related to the compensable condition. The Department may decide to continue benefits equal to Rehabilitation Allowance minus the salary the injured worker has demonstrated him/herself capable of earning.

We have significant reservations regarding the practice of deeming in general, and with the current usage of it by the Workers Compensation Board of Manitoba specifically. If one argues as has been argued here, that the Vocational Rehabilitation Services Department must have sufficient flexibility to respond to individual and unique circumstances, the deeming of income cannot be categorically prohibited. Of course, we are assuming that this flexibility will occur within the parameters of Workers' Compensation and professional vocational rehabilitation philosophy. However, the deeming of income in the case of the rural injured worker cited above is, in our opinion, unacceptable.

Deeming of income *may* be arguable in unique cases when the deemed income is actual, i.e. related to a specific job which the injured worker has performed or which is possible to demonstrate s/he could perform despite the compensable medical condition. However, the deeming of income on the basis of assumptions and presumptions is entirely unacceptable, since it is arbitrary and not supported by reference to facts.

We also believe that it is inappropriate to deem income in the cases of rural workers whom the Workers Compensation Board believes could be employed in Winnipeg. As we have indicated before in discussing the current policy on relocation, the Workers Compensation Board appears to be seriously out-of-line with the provincial government's commitment to the provision of adequate services in rural areas and the maintenance and protection of rural lifestyles.

Deeming must only be used in extraordinary circumstances; as a common practice it promotes general ill will since it cannot be justified on the basis of fairness.

8) Nurse Coordinators

At the present time, the Workers Compensation Board employs six nurses in positions designated as Nurse Coordinators. According to the Board's report, entitled The Nurse Coordinator Model, the role of the Nurse Coordinators (as employees of the Medical Department) is to "assess, monitor and coordinate the health care provided to Workers Compensation Board patients."[27] The document indicates that to meet this goal, the Nurse Coordinators may make initial contact with the injured worker and may also contact the accident employer to "gather information and assess the employer's understanding of the patient's injury and progress regarding return to work."[28] Discussion with the injured worker provides an opportunity "to discuss the patient's realistic expectations and the role of the Workers Compensation Board as being supportive regarding return to work."[29]

It appears that the Nurse Coordinator Model was established to address the Workers Compensation Board's expressed commitment to the concept of early case intervention. Although the intention may be admirable, we believe this course of action inappropriately adds another "layer" to the service delivery system.

In theory, Vocational Rehabilitation Counsellors counsel, hence their job title. Under the current system, in fact, Vocational Rehabilitation Counsellors spend a good deal of their time dealing with payments of benefits and various administrative functions. Counsellors told the Committee that as trained social service professionals they were frustrated with the minimal amount of counselling they were able to provide, particularly since counselling skills are a prerequisite for the position. The establishment of the Nurse Coordinator Program further erodes the Vocational Rehabilitation Counsellors' counselling role.

The Nurse Coordinator becomes yet another arm of the organization, to whom the injured worker must relate. It must be remembered that an injured worker may, in the course of his/her involvement, have input into his/her case from a Nurse Coordinator, a Claims Officer, a Medical Officer, a Medical Aid representative, a Vocational Rehabilitation Counsellor and a Reemployment Officer—all of whom have different functions and decision-making authority. Our review has suggested that even staff of the organization often have difficulty distinguishing roles and functions. One can understand the confusion many injured workers experience when faced with such a system.

In other words, the Nurse Coordinator Program avoids addressing the systemic problems mitigating against early interventions by the appropriate personnel—the Vocational Rehabilitation Counsellors. The Program also further erodes the counselling responsibilities of the rehabilitation staff, by placing part of the counselling responsibility in the hands of persons without counselling training. One can imagine the resentment of Vocational Rehabilitation Counsellors, seeing what is generally perceived as one of the more positive roles in vocational rehabilitation—supportive counselling—being systematically removed from them and leaving, particularly in the current system, paperwork and the more directive, authoritarian roles.

Finally, the Nurse Coordinator Program may have a potentially damaging influence on vocational rehabilitation planning. Injured workers want to know what to expect from the Workers Compensation Board. The Nurse Coordinator, who is not a staff member of either the Claims or Rehabilitation Departments is not, in our opinion, the most appropriate person to be providing such information. It may be that this task is not expected of them by the Board. However, it is certainly expected by injured workers for whom they provide the first personal contact from the agency. Inaccurate information, however well intentioned by the Nurse Coordinator, could create unrealistic expectations on the part of injured workers, which may result in disappointment when the actual decisions are made. To be fair, Nurse Coordinators share this problem with other staff of the Workers Compensation Board, including Vocational Rehabilitation Counsellors. However, we see no need to add further opportunity for confusion and miscommunication.

We see no essential function for the Nurse Coordinator Program as currently designed, within an adequately structured and efficiently operating Workers' Compensation system. We agree that early intervention is critical, but we do not see the Nurse Coordinators as the most appropriate service providers. It is essential that the Workers Compensation Board move toward an integrated approach to service delivery and adjudication, in order to allow trained professionals, in this instance Vocational Rehabilitation Counsellors, to perform the tasks for which they are trained and, theoretically, for which they are hired.

9) Preventative Rehabilitation

The Vocational Rehabilitation Services Department is authorized to provide services on a "preventative" basis under certain circumstances. These circumstances, quoted below, are contained in the Department's Procedure Manual:

> a) where a worker has more than one claim involving an injury to the same anatomical site and a change in vocation is both medically prescribed and would be cost effective.
>
> b) where a pre-existing condition has been enhanced to the point where it prevents the claimant from returning to his/her pre-accident vocation. The relevant factors to be considered when determining cost effectiveness will be as follows:
>
> a) the number of years remaining in the work force.
>
> b) the severity of the condition.
>
> c) frequency of compensable accident.[30]

The concept of preventative rehabilitation is generally argued both on the basis of humanitarianism and of cost savings. The humanitarian argument suggests that a worker should be assisted in locating alternative duties, even if healed from an injury and with no ongoing restrictions, if a return to the pre-accident duties is likely to produce ongoing injuries. The savings argument suggests that ongoing intermittent time losses may ultimately cost as much as assisting the injured worker toward alternative duties.

The statement above grows quite clearly from the cost savings approach to preventative service. Cost-effectiveness is determined by reference to three factors: age, severity of injuries, and injury frequency. Our concern with this approach is that **as workers get older and more susceptible to short recurrent time loss resulting from simple physical "wear and tear," they are less likely to be considered for preventative rehabilitation under the above-noted policy.**

We believe that this policy can be criticized for an inherent discrimination on the basis of age. Objections on the basis of the Charter of Rights notwithstanding, we feel that it is wrong to suggest that any worker is too old to be protected from recurrent injuries when the likelihood of such injuries is clear.

Additionally, cost-effectiveness may be highly relevant when considering the extent of a rehabilitation program, but it is highly questionable as a criterion for eligibility.

In summary, we believe that the age and cost factors currently used in determining eligibility for provision of rehabilitation services on a preventative basis may be discriminatory and, therefore, require change.

10) Wage Loss/Special Additional Compensation

The Workers Compensation Board can pay wage loss supplementation to injured workers suffering a loss of income upon return to work after a compensable injury. Some injured workers are also assessed as eligible for Special Additional Compensation, which is a form of long-term wage replacement in cases where the injured worker is functionally unemployable due to the compensable condition alone or in combination with non-compensable factors. Both payments are made under section 32(1.1) of *The Workers Compensation Act* of Manitoba. This section reads as follows:

> Section 32(1.1)—Where the board is satisfied that an injury in respect of which it

> has allowed compensation under subsection (1) has occasioned a loss in earning capacity that is proportionately greater than the physical loss on the basis of which the compensation is allowed, it may
>
> a) during a period when the workman is taking rehabilitation training satisfactory to the board; or
>
> b) if the board is satisfied that rehabilitation training is not indicated; or
>
> c) if the board is satisfied that, after a fair and honest effort by the workman, rehabilitation has not produced an earning capacity that is reasonably equivalent to his earning capacity before the injury reduced by the physical loss on the basis of which the compensation is allowed;
>
> increase the compensation allowed under subsection (1) in such amount as it considered fair and just, but the total compensation shall not exceed seventy-five per cent of the average earnings of the workman.

During public hearings this Committee heard a variety of complaints related to the calculation and payment of wage loss supplementation. A major one related to the fact that those injured workers not assessed a Permanent Partial Disability, have had wage loss payments calculated on the basis of wages earned at the time of the compensable injury, with no reference to ongoing wage increases in the pre-accident duties. Therefore, the injured worker receives decreasing wage loss supplementation over time, as wage increases in post-accident duties result in decreased supplementation. The result is that the injured worker's post-accident income remains constant, with no opportunity for increase. Since wage loss benefits are calculated on the basis of gross income, overtime earnings also result in a corresponding reduction in the amount of wage loss supplementation.

Also considered as income by the Workers Compensation Board for purposes of wage loss calculation is any pension income obtained by the injured worker on an early retirement basis, despite the fact that in most cases the worker has contributed to the plan. However, benefits derived from any private insurance are not considered income and do not, therefore, affect wage loss benefits paid. The argument for distinguishing between pension benefits and private insurance benefits is that the latter are fully paid by the worker while the former are partially paid, and in some cases fully paid, by the employer. However, we are aware of no efforts to distinguish in treatment between plans paid into by employers alone and those which have co-contributors. Section 38 of *The Workers Compensation Act* allows the Workers Compensation Board to deduct from "periodical payments" only those benefits paid for **entirely** by the employer. The Board has ignored this section in calculating Special Additional Compensation, since in the Board's view it is a discretionary benefit. In the opinion of the Workers Compensation Board it is "supplementing" the pension, not deducting it.

Our greatest concern with the current wage loss system is that it results in the injured worker remaining involved in the workers' compensation system for years on end. This is undesirable for a variety of reasons. One is that the "red tape" involved in calculating the amount of actual wage and producing a cheque, often results in the injured worker having to wait for that portion of his/her income, which had been received on a regular basis prior to the injury.

However, delays in payment, although they may lead to stress and irritation, are not our major concern. It is, rather, the continuous review of the income situation, monitoring of wage increases and obtaining of wage information, etc., that we find most problematic, because they may lead to an enforced dependency which is not, in our opinion, a healthy situation. **The purpose of the workers' compensation system is to assist injured workers in obtaining optimum independence after a compensable injury or condition. The current system of wage loss supplementation effectively undermines this purpose, creating a negative and unhealthy dependency.**

Finally, we believe that the current system of wage loss supplementation used in Manitoba is a *disincentive* to rehabilitation. Terence Ison has argued that the "actual loss of earnings method" is incompatible with a genuine and active rehabilitation service, since under such a system:

> **rehabilitation consultants are bound to be perceived as benefit control officers, and rehabilitation is almost bound to become a euphemism for a system of imposed controls.[31]**

He further states:

> **People of the calibre required for a genuine, imaginative and constructive rehabilitation service are unlikely to remain in the job, or unlikely to be hired if the job is**

> **perceived as essentially one of benefit control. The rehabilitation division of a board is almost bound to take on a paramilitary flavour, with supervision over claimants being the perceived role.**[32]

Unfortunately, Professor Ison's comments accurately reflect our perception of the Vocational Rehabilitation Services Department of the Manitoba Workers Compensation Board. We agree with his argument that a wage loss system undermines incentive for rehabilitation and also infringes upon the freedom of injured workers by subjecting them to continuing scrutiny or investigation by the Board.

Since the injured worker is unable to change residence or employment positions while receiving benefits from the Workers Compensation Board, without risking interruption or termination of such benefits, it can be argued that the wage loss method is in conflict with the basic principles enunciated in the Canadian Charter of Rights and Freedoms, which include the right of free movement.

Special Additional Compensation benefits are, as earlier noted, also a form of wage replacement but are paid on a long-term basis to injured workers recognized to be unemployable due to a combination of compensable and non-compensable factors. Current guidelines suggest review of the level of benefits on a yearly basis for a period of three years, after which a recommendation for capitalization and the "locking in" of the amount of ongoing benefits may be made.

Calculation of benefits takes into account a number of sources of income including Canada Pension Plan disability benefits, company pension benefits and, not uncommonly, "deemed" earnings, usually at the level of minimum wage. Benefits continue until normal retirement, usually age 65, or for a period of up to two years maximum, in the case of injuries occurring after age 65. Current policy also provides benefits, to the injured worker upon cessation of Special Additional Compensation benefits, equal to 2 per cent of the amount of Special Additional Compensation times the number of years those benefits have been received. This is intended as a replacement for any lost pension income and is included in the monthly payment.

The Special Additional Compensation system does not involve the same extent of ongoing scrutiny and review as does the wage loss system. However, it has been severely criticized from various quarters because of the number of income sources considered in the calculation. The Board has been criticized particularly for considering Canada Pension Plan disability benefits as income for the purposes of the Special Additional Compensation calculation.

The "deeming" of injured workers at minimum wage for Special Additional Compensation purposes has also met with considerable comment. We feel that our previous comments regarding deeming are equally appropriate with regard to Special Additional Compensation calculations. The deeming of income on the basis of an unfounded presumption is entirely unacceptable.

However, we do not propose to provide detailed criticism of the current systems of wage loss supplementation or Special Additional Compensation under section 32(1.1.) of the current legislation, since we are in agreement that **this approach to income replacement is philosophically wrong and administratively cumbersome. In its place, we recommend establishment of a pension system which addresses issues of both impairment and disability.**

11) "Successful" Rehabilitation

As earlier indicated, the term "success" in relation to vocational rehabilitation services is open to considerable difference in interpretation. For example, the table of closure statistics included in Figure 3 shows a relatively low success rate, defining success as return to work without wage loss.

But figures provided to this Committee by the Vocational Rehabilitation Services Department, regarding cases closed during 1986, claim a "success" rate of 87 per cent which is very different from the approximately 50 per cent we have indicated. However, a review of the data provided by the Board quickly reveals the reasons for the apparent discrepancy.

For example, under "Successful Rehabilitation" the Vocational Rehabilitation Services Department has included cases closed after completion of institutional retraining. **Remember, however, that under current policy clients completing academic retraining receive eight weeks maximum benefits for job search purposes, following which benefits and services are terminated whether or not the injured worker is reemployed. Therefore, the process may be "successful" for the agency but, if s/he remains unemployed, it is hardly successful from the point of view of the injured worker.**

Also, the department has included only one category under the heading "Unsuccessful Rehabilitation," that being termination of benefits and services for non-cooperation. The other closure categories, which we have designated "unilateral terminations" (i.e. termination of benefits and services after eight weeks due to identified transferable skills, persons "adjudicated out" in the midst of the rehabilitation process as having non-compensable conditions or being non-disabled due to recovery) are included under the ingenious heading of "Administrative Services Provided." The inclusion of these cases with those having a return to work without wage loss provides a much higher success rate.

We would agree that files closed after completion of an attendant's allowance review, or provision of a lump sum, might be accurately described as having been in receipt of administrative services. However, this heading is questionable when used in reference to cases in which an adjudication decision has been made by the Claims Department or the Vocational Rehabilitation Services Department. The latter include cases falling into the categories of "unavailable for the rehabilitation process" or "no rehabilitation warranted." It might be argued that such cases are neither successful nor unsuccessful, since they were, in essence, screened out prior to provision of concrete service. If so, they should be separately noted so as not to inflate the "success" figures. We included these cases under the heading "unilateral terminations" to indicate that, in fact, an adjudicative decision had been made, and that compensation benefits had been terminated prior to the injured worker's return to employment.

We are more concerned with inclusion of those cases which received eight weeks of job search due to identified transferable skills or transferable skills resulting from institutional retraining and training-on-the-job. As we have already stated, we believe that success in vocational rehabilitation is defined by a return to work. Since all of the closures cited by the Vocational Rehabilitation Services Department were made prior to the injured worker's return to work, we do not believe that they can be assumed successful. Our objections to the eight-week job search policy, which are both philosophical and related to practical concerns about the Board's existing vocational rehabilitation program, have already been discussed in some detail. However, to recap in the shortest form, **we feel that it is inaccurate to claim successful rehabilitation in cases where case closure preceded return to work. Indeed, we would argue that files should remain on open status for a period of time (perhaps four weeks) following return to work, to allow for monitoring of the injured worker's progress, particularly with regard to physical capacity to meet the job demands.**

However, this discussion has been raised not to be argumentative, but in order to reinforce the need for accurate statistics regarding service outcomes. We **will state again that success in rehabilitation is measured by successful job placements. The factors for judging the success of placement include wage loss and the ability of the worker to perform all duties on a long-term basis.**

No doubt, the Vocational Rehabilitation Services Department will disagree with the assumptions which resulted in our statistics indicating a low success rate for rehabilitation. However, we believe that due to the existing transferable skills policy and the inclusion of the questionable "administrative services provided" category under "successes," the department's statistics are open to our interpretation. Such disagreements emphasize the critical need for statistics which accurately reflect what happens to injured workers in receipt of benefits and services through the Vocational Rehabilitation Services Department, and how much the process costs.

REHABILITATION RECOMMENDATIONS

67. ***The Workers Compensation Act* should be amended to provide an entitlement to services and benefits to any injured worker unable to return to his/her pre-accident employment due to a compensable condition, or to a suitable alternate actual job, within his/her physical restrictions, with the pre-injury employer. Services should include:**

1) Benefits

Benefits equal to those paid for temporary total disability should be paid while the injured worker is engaged in a mutually agreeable rehabilitation program.

This necessitates true cooperation between the Workers Compensation Board and injured workers. The current practice of unilaterally imposing a minimal "program" of job search on injured workers, and of labelling those who do not totally comply with these requirements as "uncooperative" must not be a precondition for the development of mutually agreeable rehabilitation plans. The responsibility of the Vocational Rehabilitation Services Department to injured workers, who, because of compensable conditions are unable to return to their pre-accident employment, should continue until such time as the injured worker has returned to permanent employment or until the file is closed and benefits terminated for clear cause. We anticipate that such cases will occur infrequently.

2) Assessment

In order to provide injured workers and the Workers Compensation Board with the information necessary to set practical and realistic vocational goals, a professional assessment is necessary. All claimants should receive a professional job analysis and job modification study to explore vocational possibilities, both with the pre-accident employer and with other

potential employers. A thorough assessment should also include interest and aptitude testing. Other assessment tools may be needed, depending upon individual circumstances. We believe that funds expended in assessment are funds well spent, since, in the long run, they will result in better identification of the strengths and weaknesses of individual injured workers, and lead to better and more efficient use of rehabilitation funds.

In the course of our public hearings we heard from injured workers whose rehabilitation benefits had been terminated because they possessed what the Workers Compensation Board termed "transferable skills." All of those workers suffered from some permanent disability as the result of their compensable incident (whether or not that disability was rated by the Workers Compensation Board), and were both unable to return to work with their pre-accident employer and unemployed at the time benefits were terminated. **We believe that the identification of skills possessed by the injured worker and transferable amongst employers, should be an aid in the rehabilitation process, not a reason to terminate benefits.**

3) Rehabilitation Services

The Workers Compensation Board, through its Vocational Rehabilitation Services Department, should provide or arrange for any services necessary to provide the injured worker with the specific skills necessary to reach the identified vocational/re-employment goal. Such services may include any training, either academic, on-the-job or a combination, which may be required. The services provided should reflect the individual requirements of the injured worker, as well as of the specific job toward which the vocational plan is geared.

The Committee feels that the Vocational Rehabilitation Plan negotiated with the injured worker should be provided to that worker in written form and that it should outline the services to be provided, projected time frames and such costs as can be estimated. The written Rehabilitation Plan should be signed by both the injured worker and the Vocational Rehabilitation Counsellor and/or a representative of departmental management, in order to clearly show agreement by all participants. The Plan should, of course, be fully appealable. It should also be subject to cooperative renegotiation in response to changes in the injured worker's circumstances.

4) Placement Services

a) We believe that prior to initiation of client-centered job search activities, the Vocational Rehabilitation Services Department must be able to demonstrate that the injured worker possesses the necessary skills to conduct an appropriate and effective job search, as well as the skills necessary to obtain and maintain the re-employment position which is the goal of the rehabilitation plan.

b) The Job Finding Club model has, in other jurisdictions, a demonstrated history of success. We encourage the Vocational Rehabilitation Services Department to expand this service in order to support and assist injured workers in job search efforts, and to make job search as non-aversive an activity as is possible. The Job Finding Club should be a supportive environment for injured workers attempting to re-enter the labour force.

c) We believe that the current method of job search used by the Vocational Rehabilitation Services Department, which requires a minimum number of employer contacts per week in all cases, should be eliminated in favour of programs appropriate to the individual circumstances of injured workers. In certain cases, a monitored job search may be required. However, we believe that with vocational rehabilitation services restructured on a professional, cooperative basis such cases should be relatively infrequent. The vocational rehabilitation practitioners must be encouraged to tailor the placement program to the individual case, rather than vice versa. **Job searches should be targetted to the skills and abilities of the injured worker, as well as to the realities of the local employment market.**

68. ***The Workers Compensation Act* should include a definition of vocational rehabilitation which encompasses the above.**

69. **The Workers Compensation Board should move toward decentralization of services, through the location of offices in rural and northern Manitoba. These offices should have sufficient personnel and authority to adjudicate claims, pay benefits and provide rehabilitation services. The Workers Compensation Board must begin to provide rural and northern injured workers with the necessary skills—through academic retraining, training-on-the-job or any other appropriate means—to secure meaningful employment in or near their homes. The practice of requiring relocation not only undermines the rural and northern areas, but places increasing pressure on the labour markets of the larger centres.**

70. **The current policies and practices of the Workers Compensation Board, of terminating the benefits of those injured workers who refuse to relocate to Winnipeg, should cease. Relocation would be an acceptable alternative if it is**

desired by the injured worker and if suitable employment cannot be found in the worker's home area. The Workers Compensation Board must recognize the reality of two-earner families and must not, through required relocation, jeopardize the income of the injured worker's spouse, or jeopardize the maintenance of the family.

In those cases where the injured worker does not wish to relocate, where there are no suitable opportunities in his/her home area, where an actual job or training program exists in a larger centre, and where the Workers Compensation Board is prepared to fully compensate the injured worker and his/her family for the cost of relocation, then and only then is it reasonable to terminate or reduce the benefits of injured workers who refuse to relocate. While we recognize that it is impossible to legislate sensitivity, that is what is required.

71. **The Committee recommends that authority for all expenditures deemed necessary to the vocational rehabilitation process, be placed in the hands of the Vocational Rehabilitation Services Department or of the vocational rehabilitation practitioners within the proposed Client Services Department. Such adjudicative authority should not remain within the Medical Aid Department.**

72. **The termination of benefits and services to clients involved in vocational rehabilitation, on the basis of a medical re-examination or change of opinion, is, we believe, a questionable practice. Once a worker has been accepted for rehabilitation services, due to permanent disability, there should be no termination of benefits and services prior to completion of the mutually agreed upon rehabilitation plan, unless it is determined that the claim is one for which compensation should not have been payable, or unless there is a complete recovery from the disabling condition.**

73. **The Workers Compensation Board should review its current policy on preventative rehabilitation since, in our opinion, it discriminates on the basis of age.**

We have no method to legislate common sense or sensitivity. Yet, decisions related to the provision of rehabilitation services and benefits on a preventative basis require both. Simply stated, any policy which suggests than an injured worker is too old to be protected from re-injury, or that the cost of such prevention is prohibitive, is unacceptable. The "pay now or pay later" factor is only one consideration. The other must be the humane desire to avoid placing another human being into a situation likely to result in pain and/or disability.

Decisions around preventative rehabilitation may be controversial. Nevertheless, we believe that they are important and that they must be made. Although we cannot devise a policy to cover each circumstance, common sense plus humane concern and experience can provide some of the guidelines. **However, we believe that provision of services and benefits, on a preventative basis, should occur when recommended by the treating physician in the community. If the Workers Compensation Board disagrees with the recommendations it may seek another expert opinion.**

74. **The Vocational Rehabilitation Services Department must begin to identify sources of expertise necessary to provide complete and professional vocational assessments required for plan development and identification of a realistic re-employment goal. In those areas where the necessary expertise is not available in the community, the Workers Compensation Board should begin to develop such expertise on an "in-house" basis.**

75. **The Committee recommends that the Workers Compensation Board negotiate with the Manitoba Rehabilitation Hospital, to fund additional positions for occupational therapists to provide work assessments to injured workers, on site as well as in the hospital.**

76. **The Vocational Rehabilitation Services Department should begin gathering research material regarding existing technology for job analysis and job modification, in order to allow for early return to work with the accident employer wherever possible, as well as to assist in identifying alternative duties within post-accident physical restrictions.**

77. **The Committee recommends that the "deeming" of income be used only in those rare cases where the injured worker has refused a job, which s/he can be shown to be able to perform, at a verifiable level of income, within the physical restrictions as determined by the treating physician. If the Workers Compensation Board disagrees with the restrictions imposed, it may refer the worker for a second opinion.**

78. **The Committee believes that it is critical for the Workers Compensation Board to develop data base systems which accurately reflect vocational rehabilitation program costs and determine the extent of "successful" outcomes.**

Ideally, successful placement should result in no wage loss. However, we are aware that this is not always possible, even given extensive retraining. Nevertheless, we believe that job placement should be the focus of programming and the main indicator of success. Since we are not experts in this field, we can only encourage the Workers Compensation Board to develop a data system which allows it to relate cost and success factors, in order to provide direction in policy and program development.

FOOTNOTES

1. Ralph E. Matkin, *Insurance Rehabilitation: Service Applications in Disability Compensation Systems* (Austin: PRO-ED, Inc., 1985), p.109.
2. John D. Rasch, *Rehabilitation of Workers' Compensation and Other Insurance Claimants* (Springfield: Charles C. Thomas, 1985), p.14.
3. *Ibid.*
4. *Ibid.*, p.88.
5. Matkin, *Insurance Rehabilitation*, p.117.
6. *Ibid.*
7. *Ibid.*
8. Rasch, *Rehabilitation of Workers' Compensation*, p.83.
9. *Ibid.*, p.89.
10. *Ibid.*, p.14.
11. Matkin, *Insurance Rehabilitation*, p.143.
12. *Ibid.*, p.109.
13. Workers Compensation Board of Manitoba, *Training Manual, Rehabilitation Services Department* (unpublished), p.2.1.
14. *Ibid.*, pp.3.1-3.3.
15. Manitoba Federation of Labour, *brief presented to the Workers Compensation Act Legislative Review Committee.*
16. Workers Compensation Board of Manitoba, *Procedure Manual*, Rehabilitation Services Department, pp.4-6.
17. Matkin, *Insurance Rehabilitation*, p.169.
18. Rasch, *Rehabilitation of Workers' Compensation*, p.105.
19. David Vandergoot, Richard Jacobsen and John D. Worrall, "New Directions for Placement Practice in Vocational Rehabilitation" in *Placement in Rehabilitation: A Career Development Perspective*, David Vandergoot and John D. Worrall, eds. (Austin: PRO-ED, 1979), p.98.
20. *Ibid.*, p.169.
21. Jack L. Cassell and S. Wayne Mulkey, *Rehabilitation Caseload Management: Concepts and Practice* (Austin: PRO-ED, Inc., 1985), pp.78-79.
22. Rasch, *Rehabilitation of Workers' Compensation*, pp.62-63.
23. *Ibid.*, p.67.
24. Government of Manitoba, *Guidelines for the Seventies, Volume 3: Regional Perspectives* (March, 1973), p.36.
25. Workers Compensation Board of Manitoba, *Procedure Manual*, p.4.4.
26. Cassell and Mulkey, *Rehabilitation Caseload Management*, p.105.
27. Workers Compensation Board of Manitoba, *The Nurse Coordinator Model* (an unpublished report).
28. *Ibid.*
29. *Ibid.*
30. Workers Compensation Board of Manitoba, *Procedure Manual*, p.8.1.
31. Terence G. Ison, "The Calculation of Periodic Payments for Permanent Disability" (1984), Osgoode Hall L. J. 735, p.742.
32. *Ibid.*, pp.742-743.

CHAPTER 8

MEDICAL ISSUES

I. THE MEDICAL DEPARTMENT

A. THE ROLE OF THE MEDICAL OFFICER

In recent years the Workers Compensation Board has greatly expanded the Medical Department to include two general practitioners, a neurosurgeon and an orthopedic specialist, all of whom are full-time employees. In addition, part-time medical staff includes an internal medicine specialist; an ear, nose and throat specialist; two chiropractic consultants. Finally, the department also includes six nurses who are called Nurse Coordinators.

Currently, Workers Compensation Board Medical Officers are active in the treatment process; not only do they provide examinations for the rating of permanent disability, they also examine injured workers to clarify physical restrictions and to monitor the appropriateness of treatment by recommended physicians in the community.

As is pointed out in the section of this Report dealing with the relationship of the Claims and Medical Departments, Medical Officers are also major actors in the process of claims adjudication, with involvement both in the determination of work relatedness and in decisions regarding ongoing eligibility for benefits and services.

We believe that the extensive role presently taken by the Workers Compensation Board in the monitoring of medical treatment is not appropriate. The role of the Medical Officer should be to provide advice on medical matters to assist lay staff (such as claims adjudicators) in decision-making. However, this information should be general and should not result in the Medical Officers' becoming involved in file management. In other words, **the Medical Officer should describe the medical condition only. It is not appropriate that s/he comment on the individual case, since it is the job of the adjudicator to relate the general medical information to the specific case at hand.**

As has been stated elsewhere, workers' compensation is designed to be a self-policing system which relies upon information and recommendations provided by attending physicians in the community. The Workers Compensation Board has, in the past, created concern among many community physicians, by questioning the appropriateness of treatment being provided by physicians outside of the Workers Compensation Board. However, in cases where such concerns arise, the Board has the option of seeking an opinion from another physician in the community. We believe that pursuing this option would improve credibility with injured workers who may currently question whether the decisions of Workers Compensation Board Medical Officers are medical or administrative.

Realistically, the Workers Compensation Board cannot be interventionist in medical treatment. The costs of having the necessary specialists in-house would quickly become prohibitive. Even in the event that the system *could* bear the cost of a full staff of appropriate specialists, this model is, as has already been indicated, inappropriate within the workers' compensation model as we understand it.

If the role of the Medical Officer does not relate to adjudication or medical management, what is it? In addition to providing advice to adjudicators to assist them in decision-making (as previously discussed), the Committee also believes that **examinations of injured workers by Medical Officers are appropriate for determination of the level of physical impairment, to be used in setting pensions. However, physical examinations for other purposes are *not* appropriate and should cease.** Medical Officers may also have a role in interpreting medical reports from community practitioners (for the benefit of lay adjudicative staff), and possibly, during Board hearings (to provide general information about the medical condition under review).

With further reference to the assessment of permanent impairment for pension purposes, the Committee believes that the current schedule used by the Workers Compensation Board is inadequate and out-of-date. We strongly recommend adoption of the rating schedule prepared by the American Medical Association, which although not perfect, is a significant improvement over the one currently in use. Also, we believe that all pension awards for permanent impairment should be appealable and that, where a difference of opinion exists as to the extent of impairment under the American Medical Association guidelines, a medical review panel should be convened, if requested by the injured worker. Recent decisions by the Board of Commissioners have denied workers access to Medical Review Panel in such cases.

Currently, Medical Officers at the Workers Compensation Board are also charged with providing to adjudicative and vocational rehabilitation staff, an outline of the physical restrictions related to the compensable injury or condition. Again, we do not feel that this function is appropriate for Board medical staff. **A description of the physical restrictions should, in our opinion, be provided by the treating physician in the community.** However, in those cases in which the Workers Compensation Board has strong reason to doubt the accuracy or appropriateness of the physical restrictions provided, referral to a another community physician, for a second opinion, may be requested. Again, a medical review panel might also be appropriate in certain instances.

In summary, we see a need for significant change in the role of Medical Officers within the Workers

Compensation Board. We believe the Board's intervention in the process of medical treatment is contributing to increasing tensions between the Board and the medical community. This situation can only have negative effects on service—which is dependent upon the cooperation of physicians—and ultimately, therefore, on the injured workers whom the system is attempting to assist.

The role of the Medical Officer should be limited to consultation with lay staff, about medical matters and assessment of permanent impairment for pension purposes. Otherwise, it should be the responsibility of community physicians to examine, diagnose, treat or refer for treatment, and provide information regarding physical restrictions. It should be the responsibility of Claims Department adjudicators to interpret the medical information, with the assistance of a Medical Officer where necessary, and to determine compensability, including work-relatedness of the injury or condition. In those cases where concern arises at the Board, regarding diagnosis or treatment, a second opinion may be sought through another practitioner in the community. Medical review panels should also be recognized as a valuable tool for addressing more complex or controversial medical decisions, to ensure that the injured worker perceives the Workers Compensation Board as open to his/her concerns and committed to a full inquiry and procedural fairness.

The Committee believes that the more limited duties recommended for Medical Officers will not require the medical staff complement currently in place. However, we also recognize that pressure on Workers Compensation Boards to become more active in the area of occupational disease may be sufficient reason to consider placing a specialist in this field, on the staff of the Medical Department.

B. THE ROLE OF THE NURSE COORDINATOR

The position of the Nurse Coordinator is discussed in some detail, later in this Report. **At this point, we will merely state our strong opinion that the Nurse Coordinator model, as presently structured, does not belong within the Medical Department of the Workers Compensation Board.**

Many private insurance firms use nursing-trained staff as claims adjudicators. We can also conceive of a nurse as part of a comprehensive, team-approach to case management. However, **the use of highly-trained and relatively highly-paid professional staff, to provide a service which from our perspective is so vaguely defined, is of questionable value.**

C. SECTION 19 OF *THE WORKERS COMPENSATION ACT*

Section 19 of *The Workers Compensation Act* is reproduced below:

Practices delaying workman's recovery.

> 19 Where an injured workman persists in insanitary or injurious practices which tend to imperil or retard his recovery, or refuses to submit to such medical or surgical treatment as in the opinion of the board is reasonably essential to promote his recovery, the board may, in its discretion, reduce the compensation of the workman to such sum, if any, as would in its opinion be payable were such practices not persisted in or if the workman had submitted to the treatment.

We understand that the Workers Compensation Board must have authority to deal with those rare cases in which an injured worker is purposefully delaying recovery, by refusing treatment or consciously reaggravating an injury or condition, in order to avoid a return to work. However, we are concerned that this section of the *Act* has been used to force injured workers into surgery or treatment which is not itself without risk.

We believe that the Board is moving beyond the intentions of the drafters of the existing legislation, when it invokes section 19 with regard to any surgery or treatment which may put the injured worker at risk of increased impairment, or for which evidence exists of possible negative reactions or results. The demand of the Workers Compensation Board for the use of chelation in cases of lead poisoning is an example of our concern. Some medical practitioners have expressed a real concern about the possible risks associated with this procedure, and we do not feel that it should fall to the Workers Compensation Board to have the final decision.

Patients outside of the workers' compensation system have the opportunity to pursue different opinions before making decisions about medical treatment, including surgery. We see no reason why the Workers Compensation Board claimant should not have the same freedoms.

In summary, we do not believe that the Board should invoke section 19 of *The Workers Compensation Act*, except in those cases in which it can demonstrate that the injured worker is intentionally delaying recovery by refusing treatment and/or reaggravating the compensable condition. The use of this section to terminate the benefits of injured workers who refuse surgery or other medical treatment, is not generally acceptable to us. We feel that the decisions with regard to treatment must be left to the injured worker and his/her treating physician. Of course, as in other instances, the Board may wish to request a second opinion in those cases about which it has serious concerns regarding medical treatment.

RECOMMENDATIONS

79. **The responsibility for the monitoring of medical treatment should be returned to the treating physician who will be responsible for:**
    1) **diagnosis**
    2) **treatment and referral to specialists as required**
    3) **assignment of physical restrictions related to the compensable injury.**

    In cases where the Board has a concern regarding any of the above, a second opinion may be sought from an appropriate practitioner in the community.

80. **The responsibilities of the Medical Officer should include:**
    1) **examination of injured workers, in order to assess the degree of physical impairment for pension purposes**
    2) **consultation with lay staff, regarding medical conditions and/or the interpretation of medical reports received.**

    Other than in the case of assessments of physical impairment for pensions, we see no role for the Medical Officer in direct physical examinations of injured workers.

81. **The responsibility for determining the relationship of medical information to the compensable incident or situation, and for determining the work-relatedness of the injury or condition, should lie with the claims adjudicators. The involvement of the Medical Officer should be limited to providing general information related to the condition under review. Comments by the Medical Officer regarding a particular case are not appropriate.**

82. **The Committee recommends a reduction in the staff of the Medical Department of the Workers Compensation Board.**

    A redefinition of the duties appropriate for Medical Officers within the system, which should not include active intervention in medical treatment, will reduce the need for a large number of staff physicians and specialists.

    However, the Committee suggests that consideration be given, in light of increased activity in the area of occupational disease, to the hiring of an occupational medicine specialist.

83. **Although the Committee acknowledges that trained nurses may have a role in a team approach to claims management and rehabilitation, we also feel that the Nurse Coordinator model, as currently designed, is not the best way to use this expertise.**

84. **The Committee recommends that section 19 of *The Workers Compensation Act* be rewritten, to apply only to those cases in which the injured worker is willfully delaying recovery in order to avoid a return to work.**

    We believe that decisions regarding choice of medical treatment must be left, except in those rare cases cited above, to the injured worker and his/her physician.

    In those cases where the Board has serious concern regarding the efficacy and/or appropriateness of medical treatment, it may wish to arrange for another medical opinion to be provided.

II. MEDICAL AID

At the present time, Medical Aid Officers have the authority to adjudicate payment of certain expenditures related to medical treatment, on the basis of policy contained in the Medical Aid Manual. A copy of the Table of Contents of this manual is included below for the reader's reference. Other payments, such as attendent's allowance, are authorized in other departments, in this case the Vocational Rehabilitation Services Department.

The Committee has several concerns regarding Medical Aid as currently constituted and mandated. Efforts to respond to all possible eventualities through establishment of policy, have led to policies which appear to us to be unnecessary. The most obvious example is a policy regarding the purchase of toilet tissue, which states that:

> If an excessive amount of toilet tissue is required due to the compensable injury, 1/2 roll per day is the maximum allowable at Board expense. (Medical Aid Manual p.5.3)

One suspects that the volume of demand for purchase of toilet paper is not resulting in a major financial drain on Board finances, and that the number of requests is not causing an administrative backlog. Consequently, the policy is unnecessary.

THE WORKERS COMPENSATION BOARD OF MANITOBA

MEDICAL AID MANUAL

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(February, 1987)

An unfortunate example of an apparent lack of flexibility and sensitivity is the Board's current Medical Aid policy regarding coverage of travel costs and wage loss replacement, for spouses of workers sustaining life-threatening injuries. This policy, contained in Board Order No. 226/82, specifies the following:

1. Travel maintenance and time loss payments for the spouse. These should only continue while the injuries sustained are life threatening to be defined as the period the injured worker is in intensive care, plus three days immediately subsequent.
2. Transportation and maintenance costs for dependent children to be paid for the same period that is allowed for the spouse. Costs for custodial care for dependents remaining at home during the absence of the spouse to be paid.
3. In cases of prolonged convalescence, responsibility will be assumed for travel, maintenance and loss of income for periodic visits.
   a) Periodic visits would be defined as once every four weeks.
   b) Benefits for each periodic visit would be for a maximum of three days accommodation.
   c) Any extension of these benefits by reason of extenuating circumstances will be subject to the review and approval of the Board.

In certain cases, these provisions may be adequate while in others the restrictions may place considerable strain on a family's financial and emotional resources. Families, like individuals, differ in their resources for adjusting to the serious injury of a family member.

We believe that guidelines are required, to provide injured workers and their families with a statement of their basic entitlements. However, these guidelines must also be flexible enough to allow for sensitivity to individual circumstances, particularly in such circumstances of extreme emotional stress as result from a life-threatening injury. Provision of benefits for three days beyond release of the injured worker from intensive care, plus travel and accommodation to allow a spouse to visit once a month for three days maximum, constitutes inadequate service to the spouse of a seriously injured worker.

Also, many Medical Aid items described in the manual depend for payment upon a request by the injured worker, often to be accompanied by an explanatory report from a doctor or dentist. Others, such as translation services or purchase of various aids and appliances require authorization by Medical Aid prior to purchase.

The concern of the Committee with regard to the current guidelines is that we are not confident that injured workers routinely receive sufficient information about the expenditures appropriately paid by Medical Aid, and the procedures for expediting payments. It matters very little that Medical Aid covers an item, if the injured worker is not aware of that fact. Also, we feel that it is an injustice to an injured worker to refuse reimbursement because of the lack of prepayment authorization, if the injured worker was not aware such authorization was required.

Our concerns are not academic nor abstract, since we are aware of cases in which injured workers did not receive reimbursement for which they were entitled, because they were not fully informed. The reasons for this situation are at least twofold.

1) the Medical Aid system is designed in such a way that the injured worker requires specific information in order to use it, and
2) the Workers Compensation Board does not routinely ensure that all injured workers are fully informed of their entitlement for Medical Aid reimbursement and/or expenditure.

Attendants' allowances paid under current guidelines are less than those paid by Workers Compensation Boards in Saskatchewan, Alberta and British Columbia. **We believe that the Board should move to increase the amounts provided for attendants' allowances, to more accurately reflect the costs resulting from professional attendant care.**

Although nothing in written Medical Aid policy suggests that cost is, or should be, a factor in determining whether an injured worker will receive a specific aid, appliance or prosthesis, the Board has in the past been the centre of some controversy as to whether, in the case of prostheses, they are obliged to purchase "Cadillacs" or "Chevys." Board Order 107/84, dated April 30, 1984, states in part, the following:

> ...that responsibility will be accepted for standard-type prosthetic devices, where such is required by reason of a compensable injury, is medically described and authorized by the Workers Compensation Board and,
>
> that should the claimant prefer a more sophisticated device, the claimant should be informed a portion of their pension could be commuted in order to cover the difference in cost.

With regard to prostheses, or aids and appliances, the issue of cost should not be a major consideration. The appropriate consideration should be in providing the injured worker with the device which will allow him/her to regain optimum functioning.

Finally, we strongly believe that the Medical Aid section has no place in adjudication, no matter how minor the decision or how small the expenditure. Adjudication is the job of adjudicators whose responsibility it is to manage the case and to make the necessary decisions regarding benefits, services and other expenditures. We are not suggesting that Medical Aid guidelines should not be provided. Otherwise, the adjudicator would be "reinventing the wheel" in each case. However, the guidelines should be clear enough to provide some parameters, without being so narrow and specific that the adjudicator loses the flexibility necessary to address the injured worker's individual needs and circumstances.

The same should be true for expenditures related to the rehabilitation process. In that context, the Vocational Rehabilitation counsellor is the adjudicator, to the extent that s/he should be responsible for decisions related to expenditure required to expedite the rehabilitation process.

We believe that in order to function properly, the Workers Compensation Board must support the professional staff it has hired. For example, claims adjudicators must have the authority and support necessary for them to do their jobs, to make decisions. The same must be true for vocational rehabilitation staff. By diffusing adjudicative authority, the current structure innibits the efficient use of the Workers Compensation Board's resources. The current role of the Medical Aid section as a department with adjudicative authority exemplifies this problem.

RECOMMENDATIONS

85. **The Committee recommends that the functions of the Medical Aid Department be taken over by the Client Services Department and the Finance Department.**

    Authority for expenditures should come from the relevant adjudicator, Claims Officer or Vocational Rehabilitation Counsellor, in cases where such payments are discretionary and require an adjudicative decision.

    The Finance Department should be responsible for those payments which are automatic due to policy, for example, payments to physicians.

86. **The current Medical Aid Manual needs revision, and new guidelines are required to assist staff in the adjudication of Medical Aid expenditures. This will also require a clarification of the more limited duties appropriate to Medical Aid in the payment of non-discretionary expenditures.**

    We feel that the current policies, in many cases, lack flexibility and are not sensitive enough to the circumstances of individual injured workers.

87. **We recommend that the Workers Compensation Board provide injured workers with information regarding Medical Aid guidelines and procedures, as soon as possible following the date of injury. This could take the form, for example, of a brochure forwarded with the first benefit cheque.**

    It is the responsibility of the Board to ensure that injured workers are fully informed of their entitlements and of the procedures for reimbursement and/or authorization of expenditures.

88. **Those costs normally associated with the active treatment of the compensable condition should be paid by the Workers Compensation Board, without the requirement for pre-authorization.**

89. **Adjudicative responsibility for Medical Aid should be removed from the Finance Department and placed with the combined Claims/Vocational Rehabilitation (Client Services) Department. Payments should continue to be the responsibility of the Finance Department.**

90. **The Committee believes that current policies relating to wage replacement, transportation, accommodation and other benefits to spouses of seriously injured workers, as provided under current policy, require significant enhancement. These benefits should be provided for an increased duration, under policy flexible enough to allow for sensitivity to the emotional and financial needs of individual families.**

91. **Translation and interpretation services should be provided upon the request of an injured worker, and should not require prior approval. Workers Compensation Board staff should be encouraged to use interpreters when they are unable to communicate effectively with an injured worker, due to a language barrier.**

CHAPTER 9

FINANCIAL AND ASSESSMENT ISSUES

I. BACKGROUND

Our Report follows closely on the release of the Annual Report of the Workers Compensation Board (April 1987), which shows an unfunded liability of $84 million. Some may perceive the timing as unfortunate, believing that many of our recommendations are going to result in extra costs to the system. Others will see the Report as being timely, calling as it does for a major overhaul of the compensation system, which may result in savings. We did not predicate our recommendations wholly on the financial status of the Board, even though we were more informed of their difficulties than most; rather, we attempted to remove the financial crisis from our analysis of what type of compensation plan is needed to meet the needs of Manitoba employers and workers. We did so for a reason. If one takes the short view of workers' compensation, reacting to difficulties year by year and patterning the administration of the program on the finances, a very uneven and inconsistent result will occur. It is necessary, therefore, to keep in mind the need for consistency over time, so that some workers do not end up "winners" and others "losers," while employers in one historic era pay less than their fair share and those in another, pay more than their share. The ideal is to have a program in place—efficient and well-run—which provides no major surprises to either workers or employers.

Having said that, we must admit that we are not pleased with the long-term financial planning at the Workers Compensation Board. A review of the record over the past decade shows that short-term decisions were made, which have returned to haunt the system.

By way of background, and as a general statement about the assessment history of the Manitoba Board, events occurring in the rest of Canada have escaped attention here. While other Boards in other provinces were facing the need to improve their program and service in the 1970s (increasing assessment rates on employers in order to pay for the improvements), Manitoba continued with the lowest average assessment rate in Canada, actually reducing the rate over a period of years when other Boards were raising theirs.

Several comparisons can be made which graphically demonstrate this. For instance, the following table shows the historical average assessment rate in two similar-sized provinces with similar-sized compensation systems. Starting with a roughly comparable average assessment rate in the early 1970s, the Saskatchewan rate climbed to over double that in Manitoba, in the space of a few years.

Year	Manitoba	Saskatchewan
1972	$1.14	1.02
1973	1.16	1.45
1974	1.22	1.82
1975	1.18	2.14
1976	1.10	2.21
1977	0.98	2.16
1978	0.93	1.92
1979	0.93	1.70
1980	0.90	1.42
1981	0.89	1.31
1982	0.82	1.22
1983	0.90	1.27
1984	1.11	1.27
1985	1.38	1.37
1986	1.64	1.38

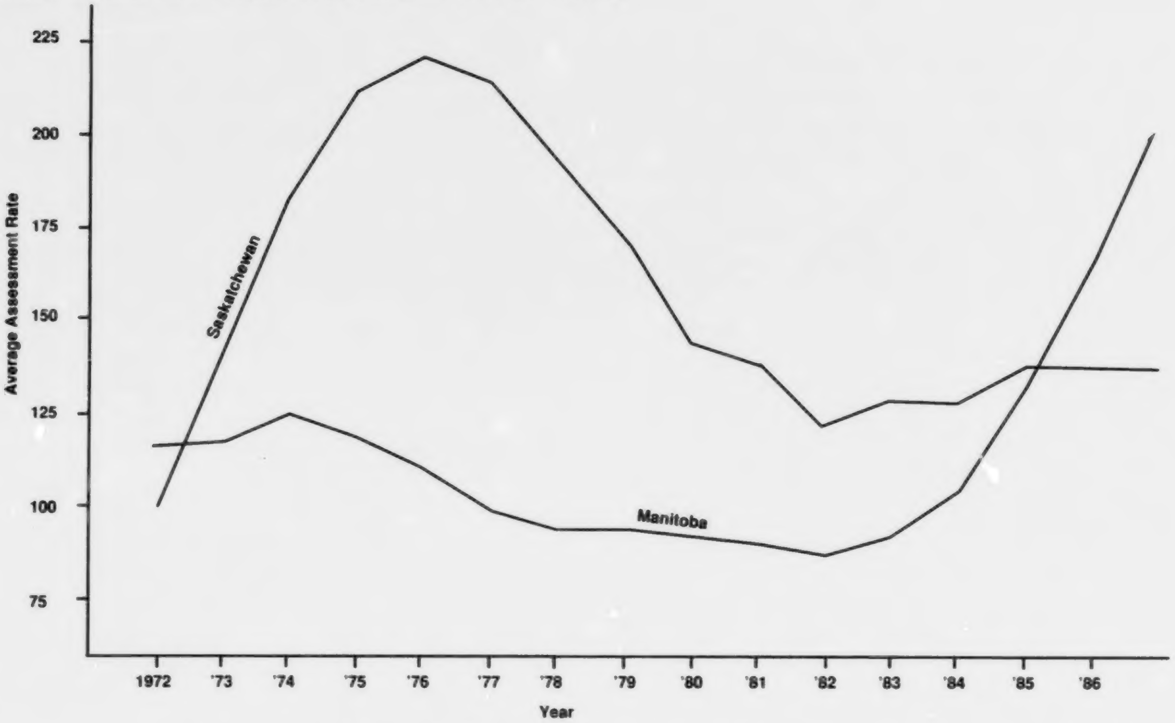
The above information pictorially displays as follows on the next page.

The Saskatchewan Board, in the years that its rate was much higher than that of Manitoba, built up significant reserves which had the impact of allowing that Board to stabilize and reduce assessment rates. Such reserves are not limited to a surplus in the General Employers operating balance, but are spread across the entire operation: in the Pension Fund, Disaster Fund, and Claims Cost Outstanding Reserve. By contrast, the Manitoba situation, with a much lower assessment rate in position throughout the 1970s and early 1980s, was put in a position of having to play "catch-up."

This sort of comparison exists not only between Manitoba and Saskatchewan. As the following chart shows, the average rate in Manitoba was lower than other Canadian provinces as well, over recent years.

	Year and Rate					
Province	**1981**	**1982**	**1983**	**1984**	**1985**	**1986**
British Columbia	2.52	2.96	3.03	2.79	2.78	2.41
Alberta	1.60	1.71	1.75	1.58	1.52	1.65
Manitoba	**.89**	**.82**	**.90**	**1.11**	**1.38**	**1.64**
Ontario	1.69	1.77	1.88	2.17	2.31	2.65
Quebec	2.10	2.16	2.05	1.88	1.89	2.05

Average Assessment Rates
Manitoba and Saskatchewan 1972—1986



Assessment revenue has certainly increased in Manitoba, and the reasons for the revenue increase are twofold; firstly, the taxation base or assessable payroll has continued to increase and, more obviously, the rate has increased. The following chart shows the relationship between the assessable payroll, the revenue, and the average assessment rate:

Year	Assessable Payroll (billions)	Assessment Revenue (millions)	Average Rate (per $100)
1978	2.4	22	.93
1979	2.7	25	.93
1980	2.9	26	.90
1981	3.3	29	.89
1982	3.4	28	.82
1983	3.6	33	.90
1984	4.0	44	1.11
1985	4.3	59	1.38
1986	4.4	72	1.64
1987 (est.)	4.7	92	1.97

Unfortunately, before revenues began increasing rapidly (1984 and onwards), the expenditures were increasing even more rapidly—resulting in a net loss for the operation.

Year	Revenue (Assessment, Interest and other)	Expenditure	Gain/ Loss	Balance
1980	31.9	31.2	0.6	36.4
1981	35.7	37.4	(1.7)	34.6
1982	35.6	47.3	(11.8)	22.9
1983	42.1	61.2	(19.0)	4.0
1984	45.9	63.1	(17.2)	(13.4)
1985	57.8	71.2	(13.5)	(26.9)
1986 (est)	66.2	79.4	(13.2)	(40.1)*

*The total unfunded liability of $84.3 million will be discussed later in the Report.

One conclusion from these figures is that the Board, in setting the 1982 assessment rate, determined to reduce the rate in order to reduce the surplus balance in the General Employers fund. A second conclusion would be that the rate was not raised quickly enough in subsequent years, to pay for the increased expenditures.

While the shortfall in annual revenue is serious, we are also concerned with actions taken by the Board, over a number of years, in order to meet part of the revenue shortfall. These actions, described below, have had the effect of reducing the margin of fiscal safety in other funds the Board has on hand to stabilize the operation.

II. RESERVE FUNDS

1. Equalization Fund

The Workers Compensation Board has an Equalization Fund which was established to meet losses arising from any disaster or extraordinary circumstance. It is not too difficult, for instance, to envisage instant liabilities created to the tune of millions of dollars if a major mining cave-in, airplane crash, or fire occurred, with significant loss of life and/or serious injury to many. While the amount which should be set aside is probably open to conjecture and debate, we feel that a fund in the area of $5 million to $10 million should be the ideal. The following graph shows the short-term history of the Equalization Fund.

Year	**Amount in Fund** (millions)
1981	$2.2
1982	2.2
1983	1.8
1984	1.0
1985	0.6
1986	0.6

As you will note, rather than building the Equalization Fund towards a more realistic figure which could cope with a significant disaster, the Board has allowed the fund to deplete to where it is incapable of handling such an event. Since money to replenish amounts used from the Equalization Fund would had to have come from total revenue, there has been a subsidization of revenue at the expense of planning for disaster.

We are aware that the Board has recently reviewed this fund with actuarial advice and found the amount sufficient to meet past experience. Yet, the question of how much money should be set aside for potential disaster is as much philosophical as it is arithmetical. We believe, as stated, that an Equalization Fund of from $5 million to $10 million is probably more reasonable. Because of the Board's difficult financial situation, it is unrealistic to expect such a figure to be allocated quickly. However, we feel that protection against a possible disaster is important enough that we believe the Board should be seriously investigating the possibility of insuring itself against this possibility. Therefore, we recommend as follows:

RECOMMENDATION

92. That the Board explore the possibilities of reinsuring against a disaster, until such time as it is able to set aside an adequate Equalization Fund.

2. Second Injury Fund

Workers Compensation Boards establish Second Injury Funds to meet part or all of the cost of claims for workers suffering enhanced disabilities due to pre-existing conditions. For example, suppose an employer hires a worker who has previously been injured or who has a congenital weakness. If the worker is injured, increased costs may result because of the previous condition. These increased costs are charged to the Second Injury Fund. The rationale for such allocation of costs is that employers should be able to discount pre-existing conditions when hiring workers.

The financial history of the Second Injury Fund is as follows:

Year	**Amount** (millions)
1981	0.7
1982	5.8*
1983	6.5
1984	2.4
1985	2.0
1986	7.5

*Transfer from the Pension Fund.

You will note that a $5 million transfer of money from the Pension Fund occurred in 1982, raising the total in the Second Injury Fund to a more reasonable figure. However, the fund was then allowed to drop to a questionable level. As occurred in the Equalization Fund, the failure to replenish this fund on an ongoing basis resulted in short-term relief for revenues of the Board.

An actuarial study conducted in 1986 found the required reserve to equal $7.5 million, $6.2 million of which the Board was required to account for in one year. Had the reserve not been allowed to deplete, funding requirements of such magnitude would not have been necessary in one year.

RECOMMENDATION

93. **We recommend that the Board not allow funds set aside for special circumstances to be depleted in order to cover short-term shortages in revenue.**

3. Rehabilitation Fund

The Rehabilitation Fund was originally established to meet the costs of vocational training and other rehabilitation measures. However, with the onset of a major initiative in the area of rehabilitation begun several years ago, we question the usefulness of such a fund. What is apparent in a review of the level of the fund over the past few years, is that costs of rehabilitation have outstripped the amounts in this fund and that serious consideration should be given to closing the fund out and transferring all costs to rehabilitation expense.

Year	**Fund** (millions)
1981	1.5
1982	2.8
1983	5.2 *
1984	1.9†
1985	2.0

*$7 million transferred from Pension Fund.
†$2 million transferred from Rehabilitation Capital Fund.

We note that in the Rehabilitation Fund, as in the previous two funds discussed, a transfer of money occurred. Firstly, $7 million went to the Rehabilitation Fund from the Pension Fund in 1983, and the $7 million found its way into the revenue column. Secondly, $2 million from the Rehabilitation Capital Fund went the same way.

RECOMMENDATION

94. **We recommend that the Rehabilitation Fund be closed out, with rehabilitation payments coming from general revenues.**

4. Rehabilitation Capital Fund

A Rehabilitation Capital Fund was started several years ago, in order to meet future projected expenditures on a building which the Board would use for specialized rehabilitation. The history of the fund is as follows:

Year	**Amount** (millions)
1981	$1.7
1982	1.9
1983	2.0
1984	NIL

A decision was made in 1984 to disband this fund, given the unlikelihood of the Board becoming involved in a major capital building project in the foreseeable future. The $2 million from the fund was transferred to the Rehabilitation Fund. We have already recommended that this latter fund be closed out. You may wish to note that the $2 million from the Rehabilitation Fund went to support revenues.

5. Future Cost of Existing Claims Fund

The Future Cost of Existing Claims Fund is established to meet the anticipated amount required to pay future costs on existing claims. The history of the fund is outlined below:

Year	**Amount** (millions)
1982	41.9
1983	46.2
1984	51.2
1985	56.5
1986	$108.6

You will note, of course, the near-doubling of this liability in the one-year period, from 1985 to 1986. The explanation by the Workers Compensation Board in its 1986 Annual Report is as follows:

> In order to verify the accuracy of reserves for the future cost of existing claims chargeable to Class G employers, the Equalization Fund, and the Second Injury Fund, the Board approved an actuarial review of these reserves during 1986. The actuarial estimates, received in February, 1987, have been booked in accordance with required accounting and auditing principles and have resulted in an additional appropriation of Class G funds amounting to $44,135,750. It should be noted that the previous actuarial review in 1983 did not require an additional provision for the future cost of Vocational Rehabilitation. Implementation of the 1981 Lampe Report and the 1983 Section 100 Rehabilitation Advisory Committee recommendations have established cost trends which are required to be recognized. The adjustment for the required Rehabilitation costs portion of the reserve amounts to $37,795,003.

This $37.8 million, along with $6.2 million allocated to the Second Injury Fund and the $13.2-million excess of expenditure over revenue for 1986, combined with the previous $26.9-million unfunded liability, to form the $84.3-million total unfunded liability. We have already commented on the Second

Injury Fund situation and the growth in the operating deficit; therefore, a comment on the $37.8-million increase in the Future Cost of Existing Claims Fund is in order.

With due respect to the Board's explanation that this amount became known after an actuarial review in 1986, we would argue that the increase was predictable and should have been dealt with sooner. We have several reasons for such a belief. To begin with, the expansion of the rehabilitation program, which began in 1982-83 and carried forward to the present, was predictable in leading to an increase in costs outstanding. Predicting the precise amount of this increase would have been difficult without an actuarial review, but the fact is that an actuarial review should have been conducted sooner because of the certainty of the situation. Secondly, we have discussed the matter of booking the rehabilitation liability with several different sources. It is apparent from these discussions that the Workers Compensation Board did not want to acknowledge such liability, arguing that rehabilitation was not compulsory under law and could, therefore, be cancelled at any time, reducing any liability to zero.

(You will have noted our recommendation in the Rehabilitation section of this Report, that workers be **entitled** to rehabilitation, rather than leaving such a decision at the total discretion of the Board. Part of our reasoning in making that recommendation was a feeling, subsequently shown to have merit according to the above information, that the Workers Compensation Board was not totally committed to its rehabilitation program.)

Had the Board recognized the liability in the area of rehabilitation earlier, it would have meant an addition of several millions of dollars a year over the course of several years to the Future Cost of Existing Claims Fund, rather than the incredible jump of $37.8 million in one year. With the present data processing capabilities of the Board, generating an information base for actuarial evaluations is much easier than in the past. Therefore, we recommend as follows:

RECOMMENDATION

95. That the Board move to an annual actuarial evaluation of reserves, with a complete sharing of the results with interested parties.

6. Pension Fund

The Pension Fund was set up to pay all pensions which are awarded by the Workers Compensation Board. The record of the fund is as follows:

Year	**Amount** (millions)
1981	109.4
1982	106.7
1983	134.9
1984	150.2
1985	171.0
1986	171.8

On the surface, especially in view of a 1985 actuarial report which indicated full funding of pensions was proper at a level of $171,000,000, the Pension Fund seems to be in rather good shape. We have, however, three concerns about the Pension Fund, which rank equally with the concerns we have expressed regarding other Board funds.

To begin with, the Workers Compensation Board has diverted surpluses in the Pension Fund to other funds within its operation. The history of transferring pension surpluses is as follows:

Year		**Amount transferred from Pension Fund** (millions)
1978		5.0
1982		11.5
1983		7.9
1985		10.9
1986		11.1
	Total	$46.4 million

A number of the Board's accounts have benefitted from these transfers, including the Rehabilitation Fund, Second Injury Fund, Class "G" Employers Fund, and the Self-Insurers account.

Technically speaking, the Board has every right in law to transfer surpluses from the Pension Fund to other accounts. However, by doing so the Board is not considering the potential long-term financial implications. By way of explanation, a pattern is beginning to emerge of providing cost-of-living increases to pensioners every second year. There have been increases provided to pensioners in the years 1974, 1976, 1979, 1981, 1983, and 1985 on an *ad hoc* legislated basis, indicating commitment by all governments to increase pensions. Such increases are presently funded by setting up a sinking fund and requiring employers to pay off the liability for pension increases over seven years, a modified pay-as-you-go system. However, now that this pattern of cost-of-living increases is becoming established, the next step will be demands by the external auditors of the Board to report the situation as a contingent liability. In some ways, this is similar to the requirement in 1986 (to report rehabilitation costs as a part of the total liability of the Future Cost for Existing Claims Fund, i.e. the $37.8-million figure mentioned earlier).

The 1986 Annual Report of the Workers Compensation Board alludes to this fact in the following item from Note 6:

> In calculating the present value of the pension fund reserve no provision is made for potential future legislative amendments to *The Workers Compensation Act* which would provide increases in future pension benefits. As described in note 3, the cost of legislative pension amendments is deferred in the year awarded and recovered from the general body of employers and self-assurers over a seven year period from the effective date of the amendment.

Our second major concern is that the Pension Fund cannot support cost-of-living increases to pensions on its own because it does not generate enough surplus from year to year. And what surplus the Pension Fund does generate is being transferred to other accounts. If, at some time in the future, the external auditors insist that the contingent liability be reported, or if a decision is made to legislate automatic cost-of-living increases into the *Act*, the Pension Fund will have a shortfall of $70 million to $90 million. We believe that more care should have been taken in shepherding the surpluses in the Pension Fund. Had the $46.4 million not been removed over a series of years, it is quite possible that the Pension Fund could now sustain automatic cost-of-living increases on its own.

RECOMMENDATION

96. **We recommend that future emerging surpluses be left in the Pension Fund, and that a full reporting of the contingent liabilities be undertaken. (Our figure of a $70 million to $90 million shortfall, while based on professional opinion, is not actuarially confirmed.)**

Our third, major concern with the Pension Fund relates to the assumptions used in funding new pensions. Most Boards in Canada, when establishing a new pension, set aside enough money to handle future inflation. The Boards do this in order to have their Pension Fund self-finance (through emerging surpluses) cost-of-living increases, either legislated or *ad hoc*. Manitoba, while funding pensions at a level which provides for some surplus to develop in the Pension Fund (note the $46.4 million drawn off over a ten-year period), does not fund at a high enough level.

The net discount rates used by the Boards in the provinces of Canada when funding new pensions are shown below:

Province	Discount Rate
British Columbia	3.0%
Alberta	2.5%
Saskatchewan	3.0%
Manitoba	**6.0%**
Ontario	3.0%
Quebec	3.0%
New Brunswick	1.25%
Nova Scotia	8.0%
Newfoundland	9.0%
Prince Edward Island	8.0%

The higher the discount rate used, the less money which is set aside, and vice versa.

RECOMMENDATION

97. **We recommend that the Manitoba Board begin using a much lower net discount rate in financing new pensions. While the precise rate to be used should be subject to discussions with an actuary, we do not feel that it should be higher than three per cent.**

Summary

The Board presently has an unfunded liability of $84.3 million in the general employers fund. In addition, we believe that the Equalization Fund should have a balance of $6 million to $10 million, rather than the $600,000 presently allocated. And finally, contingent liabilities in the Pension Fund will likely be identified to be in the range of $70 million to $90 million after actuarial study, assuming continued cost-of-living increases.

Distressing as these figures are, we believe that the situation can be turned around by facing the problem head-on, admitting it is serious and taking action. We describe our recommendations later in this Chapter, but for now let us just say that insufficient long-term financial planning is to blame for a good deal of the problem. While some may wish us to point fingers of blame, we believe it rather apparent that past and present Boards, along with past and present governments, all share a part of the responsibility.

III. ASSESSMENTS

The money required to pay for the workers' compensation plan comes from the employers of Manitoba. In addition to the almost 20,000 employers who are in a group known as the General Body of Employers, and who are assessed a varying rate according to their rate code and accident cost experience, there are four groups of self-insurers. The General Body of Employers group is collectively liable for all the injury costs to all workers in the group. The self-insurers are responsible for only the costs of injuries occurring to their own workers. The following table shows the assessment statistics for the General group, for the past several years:

Year	Number of Employers	Assessable Payroll (millions)	Assessment (millions)	Average Rate/$100 payroll
1986 (est.)	19,900	$4,413	$72.3	$1.64
1985	19,531	4,261	58.9	1.38
1984	19,097	4,003	44.1	1.11
1983	18,939	3,643	32.7	0.90
1982	18,891	3,436	28.2	0.82

The four self-insurers along with their payrolls are outlined below:

	Self-Insurers (1985)	**Payroll** (millions)
Class "A"	Canadian Pacific Railways	$116
Class "C"	Canadian National Railways	118
Class "D"	Province of Manitoba: Manitoba Telephone System Manitoba Government Manitoba Liquor Control Manitoba Hydro Workers Compensation Board Public Insurance Corporation	720
Class "E"	City of Winnipeg	294
	Total	$1,318

The combined payrolls of the General Group of Employers and the self-insurers equals $5,578,900,000.

One question in the area of financing workers' compensation is a consideration of whether employers should be responsible for the entire cost of the program. Elsewhere in this Report, Mr. Farrell expressed his view that the general revenues of the province should support part of the cost of compensating pre-existing conditions. Aside from that caveat, we believe that employers receive significant gains from the workers' compensation program—gains which were recognized at the time the plan was originally started and gains which have carried on down to the present day. Among the benefits to employers is the primary one: freedom from lawsuits by workers injured on the job. There are the other human relations advantages which were outlined in the Introduction to this Report, so let us merely repeat that we believe that employers should continue to fund workers' compensation.

Another question which continually arises when discussing workers' compensation, is who really pays for the program? Although employers are the ones assessed the costs, some argue that such costs represent a uniform tax on all business, which is passed through to the consumer or general public. This holds true in industries captive within the Manitoba borders. For instance, if there are 1,000 grocery stores in Manitoba, all paying the same workers' compensation premium, compensation costs will be passed on to the buying public; and because it is a uniform rate for all grocery stores, it does not provide a competitive advantage or disadvantage to any single employer. On the other hand, industries which rely on exporting goods or services beyond the borders of Manitoba may see some competitive disadvantage if the compensation rate in this province is significantly higher than in a neighbouring province which produces the same goods or services. Traditionally, it has been believed that other variables (such as the size of work force, average wage, unemployment rate, etc.) play a far more important role than workers' compensation does in corporate decisions as to whether to expand in one province or another. Workers' compensation premiums form only one part of these variables. Other enquiries similar to this one have found the role of employers in funding workers' compensation to be that of a funnel which channels the required payment, to the compensation system from society. Any final determination of this question is ultimately less important than the principle that employers continue to pay for the program, something which we endorse (excepting the aforementioned minority position on pre-existing conditions).

Another consideration regarding the financing of workers' compensation is whether the program should be totally pre-funded or whether it may properly revert to a pay-as-you-go system. This question is particularly important in view of the financial status of the Board at present. Our personal bias in favour of a pre-funded system should be apparent by now, and that bias is based upon several reasons. Firstly, and as outlined in Section 66 of the *Act*, the employers of one generation should not, as much as is practical, pay the costs for employers of another generation. In other words, workers' compensation should strive to collect from employers in business today, the costs for injuries which occur today. When major shifts occur in the economy, with some industries dying off while others come into being, no transfer of significant liability should occur onto the new industry.

A second consideration has to do with the inherent risk of an industry and the cost of financing that risk. By way of illustration, if an industry is so risky that it causes significant numbers of injuries and deaths, it should support the cost of that risk in order that decisions can be made as to whether the industry is capable of being sustained as a viable enterprise. If compensation costs become intolerably high, that would be an indicatation that the damage being done to workers is becoming intolerably high.

A third factor in our desire to see as much pre-funding as is practical, involves a wish to see the assessment rate as stable as is possible over time. If current revenues are used to cover all compensation costs rather than pre-funded pools of money, a recession in the economy (with the payroll dropping off drastically) will result in the need for a drastic increase in assessment rates to cover ongoing costs.

Therefore, while there may be room for debate on pre-funding versus pay-as-you-go, we definitely prefer the former. However, a problem arises when attempting to be too strict in adhering to this ideal.

Calculating the future insofar as workers' compensation is concerned is an inexact science. The Board has no way of predicting, other than by a record of past experiences, how many work injuries will occur in a given year. The following table shows the history of the number of work accidents reported in recent years:

Year	Total Accidents Reported
1986	54,228
1985	50,380
1984	48,685
1983	44,133
1982	44,737
1981	48,904
1980	46,627
1979	46,463
1978	42,418

An analysis of the figures shows that the gross number of accidents reported, neither remains static nor shows a pattern of continual increase or continual decrease. It varies with the size of the workplace, the type of work being done (risk) and the expansion or contraction of the economy.

Since assessment rates are set late in one year for the following calendar year, only the past record of numbers of injuries and cost per injury can be used in predicting the following year. If something changes (for example, if there is a significant increase or decrease in the number of injuries), estimates may be substantially inaccurate. Therefore, the concept of collecting sufficient money in one year to pay for the injuries occurring in that year must take into consideration the inability to accurately predict into the future. The concept of pre-funding must be carried out over time, rather than relying on the surplus or deficit in operating revenue in any given year. *The Workers Compensation Act* may not reflect this reality, or may be interpreted as demanding that the Board match revenue and expenditure in each year—something we consider impossible to do. The pertinent Section 66(1) of the *Act* reads as follows:

> 66(1) For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy upon and collect from, the employers in each class by an assessment or by assessments made from time to time rated upon the payroll, or in such other manner as the board may deem proper, sufficient funds, according to an estimate to be made by the board,
>
> (a) to meet all amounts payable from the accident fund under this Part during the year including administration costs;
>
> (b) to meet all costs and expenditures chargeable to the Fund under The Workplace Safety and Health Act;
>
> (c) to provide in each year capitalized reserves sufficient to meet the periodical payments of compensation accruing in futures [sic] years in respect of all accidents that occur during the year so as to prevent the employers in future years from being unduly and unfairly burdened with payments that are to be made in those years with respect to accidents that have previously happened; except that in cases where future payments are guaranteed by the Government of Canada or the Government of Manitoba, the board may dispense with the setting-up of reserves;
>
> (d) to provide a surplus or equalization fund to be used to meet the losses arising from any disaster or other circumstance that, in the opinion of the board, would unfairly burden the employers in any class;
>
> (e) to provide a fund to be used to meet that part of the cost of claims of workmen suffering enhanced disabilities, because of similar or other disabilities previously suffered, as in the opinion of the board, is due to the previous disabilities;

(f) to provide a fund to meet the costs incurred under subsections (16) and (21) of section 24; and

(g) to pay for the salaries, costs and expenses of the worker advisers and staff appointed under section 91 and the remuneration of physicians appointed under subsection 54.1(8.5).

We believe that the concepts outlined in Section 66(1) should remain, but that the practicality of the situation needs inclusion.

RECOMMENDATION

98. We recommend that Section 66(1) of the *Act* be amended to reflect the practical problem of collecting sufficient assessments each year to meet expenditures. We agree with the concept of Section 66(1), but the wording may be too restrictive.

Having generally outlined some of the questions with respect to financing workers' compensation and assessing employers, we are left with providing needed recommendations for improvement. One of the first things noticed when comparing Manitoba coverage of workers with that in other jurisdictions is that **far too many Manitoba workers are not covered by workers' compensation**. This situation arises for a variety of reasons.

Firstly, the specific industries covered by workers' compensation in Manitoba are outlined in the *Act* and in a Schedule of Industries appended to the *Act*. All industries not specifically listed are not required to have workers' compensation coverage for their workers. This differs significantly from Saskatchewan, for example, which requires all industries to be included in the compensation plan, **except** those specifically excluded by a Schedule. This means that a far greater number of Saskatchewan employers (and workers) are protected by the *Act*. The following table compares the total number of employer accounts in a smaller province (Saskatchewan) with that of Manitoba:

Year	Number of Manitoba Employers Accounts	Number of Saskatchewan Employers Accounts
1985	19,531	32,743
1984	19,097	32,199
1983	18,939	31,406
1982	18,891	30,236

Another example of measuring the total coverage of workers throughout the workforce was provided to us in the form of the following table which shows the estimated percentage of workers covered by workers' compensation in Manitoba in 1984:

Industry	Per cent covered
Agriculture	4%
Forestry	66%
Fishing and Trapping	66%
Mines, Quarries and Oil Wells	98%
Manufacturing	90%
Construction	71%
Transportation	69%
Trade	67%
Finance, Insurance, Real Estate	15%
Service Industry	78%
Public Administration	62%
Overall	71%

If there is 71 per cent coverage in all industries, the calculation is that approximately 350,000 out of 490,000 workers are covered, leaving approximately 140,000 workers in Manitoba without workers' compensation protection. We believe that Manitoba must bring a far greater number of workers and employers under the protection of the workers' compensation plan.

The following example may indicate that the desire to cover additional workers is more than merely an attempt to provide fairness and equality. In Manitoba, industries not automatically included under the *Act* may apply for voluntary coverage. An employer in this category came to public hearings and outlined his concern. His business involved a high degree of risk and he felt, as a responsible employer, that he should have workers' compensation protection for both his company and his workers, so he took coverage. Unfortunately, in all of Manitoba his was the only firm in that particular line of work to opt for voluntary coverage. When bidding against competitors for business, this employer was penalized by the amount of compensation premium. We believe that the "good" employer should not be penalized.

RECOMMENDATION

99. We recommend that workers' compensation coverage should be broadened to include as many employers and workers as possible. This should be done by amending the *Act* to provide for compulsory coverage, except in situations specifically excluded by Regulation.

Almost as an aside, we wish to make a special plea for the industry of farming. While we are aware of the financial difficulties in the farming community, and while we are aware that individual farmers will likely prefer to retain the option of coverage, the situation of farm labour should be dealt with.

RECOMMENDATION

100. Farm labourers should not be excluded from coverage by workers' compensation. Individual self-employed farmers should retain the right to take out voluntary coverage.

The second major reform of the assessment base of workers' compensation is for the self-insurers to become a part of the collective liability pool. We previously listed the self-assurers along with their size of payroll. The argument in favour of leaving them apart from the group of general employers contains three main factors—they pay their full way, they are large enough and stable enough to guarantee their payments, and they do not wish to become a part of the total General Employers deficit. One has to question, however, whether the self-insurers do pay their full share. We described various funds set up by the Compensation Board in order to assure (or try to assure) financial stability. The self-insurers do not play a role in contributing to this stability of the entire operation, except as it affects their own operation. It is a general truism in insurance theory that the wider you spread the risk, the more stable the rate of premium.

With respect to the stability of operation and the guarantee of benefits to workers injured in their employ, it is probably correct to say that the two railways, the City of Winnipeg and the province as employers will be around for some time to come. However, we have seen in North America examples of large urban centres which have required special fiscal assistance because of financial difficulty, New York City being one example. As well, several major employers whom one would have never predicted to fail do declare bankruptcy. And there is always the possibility of corporate change (through sale, takeover or division of assets), which may lead to future difficulties. All these possibilities pale, however, before the basic fairness of the issue, i.e. whether a handful of very large employers should be singled out for specialized attention by the compensation system, merely because of their size. We believe not. We believe that they should become part of the collective liability system along with the rest of Manitoba employers.

Sharing the unfunded liability should not be a concern. Although self-insurers will (under the collective liability principle) share in the total liabilities of the workers' compensation system, individual group accounting of premium paid and cost incurred will not necessitate the collection of inordinate amounts of money to retire the liability. What should happen is that an assessment rate will be set which will gradually lead to a surplus balance for the particular industry or grouping the self-insurer is placed into.

The third major reform necessary for the assessment area of workers' compensation lies in the reclassification of employer rate groups. There are two extremes in classifying employers for workers' compensation purposes. If pure collective liability principles were to be followed, all employers would be equally responsible for all injuries to all workers. This would result in an identical premium for all employers, much like the way Unemployment Insurance is charged. The other extreme would be to have a separate rate group and premium for every employer covered by compensation law, making every employer a sort of self-insurer. While we tend to lean heavily towards the pure collective liability system, we are not convinced that such a move would garner wide consensus. Those employers in the low-risk (low premium) industries feel they deserve their lower premium because they have so few accidents, while those in the high-risk (high premium) industries more readily understand their financial responsibility because of the large number of injuries. The flat premium may have gained acceptance in the Unemployment Insurance system but it is unlikely to do so in workers' compensation.

We do believe, however, that the present method of setting employer rate codes requires a major overhaul. By way of background, the rules for classifying employers appear never to have been formalized in Manitoba. Historically, the classification system grew as the number of industries to be covered grew and as the legislation affecting assessments changed over the years. At present, there are approximately 70 different rate codes or classifications under which an employer can be assessed, and about 50 compulsory codes and 20 voluntary codes. We believe that the number of such classifications, keeping in mind the collective liability principles, should be reduced and made simpler.

We believe that the compensation system could operate with approximately 20-25 different rate codes, with compression between rates at the bottom end, and expansion between rates at the top end. For instance, rather than the typical example of rates existing in Manitoba at present and as outlined in the left column of the table below, we can envisage a rate code more in line with that on the right:

Manitoba at Present	Manitoba in Future
$18.50	$18.00
11.00	15.00
9.33	12.00
8.71	10.00
6.99	9.00
...	...
...	...
1.50	2.00
1.20	1.60

Manitoba at Present	Manitoba in Future
1.12	1.40
1.00	1.20
0.75	1.00
0.60	0.80
0.45	0.70
0.40	0.60
0.28	0.50

You will note that we have tried to make the classification system as simple as possible, with rates that are rounded-off to the nearest 10 cents. This has been done purposely, to both simplify the classification and impress upon viewers that it is a collective liability system rather than a directly charged system (as would be intuited by a rate of 83 cents, for instance).

Such a reduction in the number of codes would have a greater effect than emphasizing the collective liability nature of workers' compensation. It would, for example, create larger rate groupings which automatically provides for a larger insurance base. A rate code with only a very few employers would likely be eliminated. The above would lead to a higher degree of stability in each grouping, with a high-cost accident having less effect on the larger insurance base.

Combined with the simplified and reduced number of classifications, we would propose a minimum assessment rate be applied. Part of the reasoning for such a proposal lies in the administrative cost of handling a large number of very small accounts. Another reason is that low-risk employers, even though they may have a very good long-term claims cost experience, are insured against any possible combination of disaster or abnormal cost experience. Finally, we propose a minimum rate for collective liability, the reasons for which have been previously outlined.

We believe that if such a new classification system is developed, with a minimum rate, some movement within the system will be possible for employers. For instance, if the industries manufacturing widgets and those manufacturing gizmos are in the same rate code, but over a five-year period manufacturing widgets has a much better claims cost experience, it should be able to move to a lower cost manufacturing code.

A side issue in the area of assessment design was the call for employers to have a merit- or experience-rating plan introduced by the Board. A merit-rating plan, in its design, reviews the cost experience of each individual employer covered by workers' compensation and provides a rebate of premium to those employers with a better experience than the average.

We were fortunate in being able to attend a conference in Toronto, in September 1986, on the subject of merit rating. From this conference we learned many things, one of the more interesting being that in provinces which have adopted merit rating, employers are just as unhappy with the plan in effect, as they are in Manitoba where no plan is in effect. Another thing we learned is that in order to introduce a merit-rating plan, an extra premium will have to be charged to **all** employers in order to reward the few who receive the rebate. The alternative to assessing all employers for a merit plan is to provide for a matching demerit for some employers in order to reward others. These financial implications alone are enough for us to recommend that no merit-rating plan be introduced in Manitoba at this time.

Financial considerations, however, are only one aspect of the decision not to recommend merit rating. The objectives of those who argue for merit rating are to promote occupational health and safety. Merit-rating plans do not, however, measure success in prevention of injury and disease; they measure the success in reducing claims costs. Aside from better health and safety promotion, there are ways of reducing claims costs, most of which have a negative effect on the workers' compensation system. For instance, we heard numerous instances of how attempts were made to suppress injury reporting, direct work injuries to private insurance coverage, pressure workers to stay on the job when medical attention was clearly required, coerce workers back to work too soon, etc.— all this occurring in jurisdictions which had a merit-rating plan in effect. In other words, efforts tended toward reducing claims cost rather than reducing injuries. While some claims control is necessary in workers' compensation, too much leads to the adversarial system we are so much trying to avoid in Manitoba.

Another strong argument against the introduction of a merit-rating plan comes when you recognize merit rating's inability to predict occupational disease claims. As an example, an employer may benefit by rebates from merit-rating plans over a good number of years because his/her claims cost experience is favourable. However, throughout this same period occupational disease claims could very well be developing in his/her work force. Because of the long latency period of many occupational diseases, the employer could well have gone out of business or the business could have changed hands, etc., by the time the disease claims become manifest. Only then will the **true** claims cost experience be apparent, long after rewards have been paid out. This is unacceptable.

Research is scant and/or unavailable to show that a merit-rating plan can lead to a reduction in work injuries. If such research became available to show a positive effect on the compensation system of the introduction of such a plan, it would call for a review of our decision. However, if the government accepts our later recommendation for a regular review process, we would strongly suggest that such material be submitted to a future review before any decisions are made, at either the Board or government levels, to proceed with merit rating.

RECOMMENDATIONS

101. We recommend that no merit-rating plan be introduced in Manitoba workers' compensation.

102. We recommend that a new classification system be developed with fewer categories, rounded rates, and a larger spread between rates at the top end of the scale than exists at the bottom end.

103. We recommend that a minimum assessment rate be set for workers' compensation coverage, our suggestion being 50 cents per $100 of payroll.

There is one other main area of concern with respect to assessing employers under workers' compensation—that of the increase in workers being considered as subcontractors. Within the last few years, more and more workers are losing their direct relationship with their employers. Whether such a trend is directed toward reducing cost (minimum wage, statuatory holiday, hours of work, etc.), reducing the possibility of organization by a trade union, or fostering a greater entrepreneural spirit in the work force, is unimportant from our perspective. What is important is that those classed as subcontractors usually lose their workers' compensation coverage.

We are not speaking of the large company which sub-contracts to a general contractor in construction. Such a company has employees and those employees are covered by workers' compensation at present. Our concern is for the individual worker who, because of changing technology or changes in employment contract, finds him/herself doing the same work with a different title, that of subcontractor. We could point to residential construction which is mainly carried out through the use of framers, drywallers, etc., who are considered independent.

Solutions to this problem have been sought and attained, with differing levels of success, in other provinces. A similar effort must be made in Manitoba to ensure that workers do not lose their rights to workers' compensation protection.

RECOMMENDATION

104. We recommend that legislative and policy changes be adopted in Manitoba, similar to either Alberta or Saskatchewan, to protect individual workers designated as subcontractors.

These four basic changes in the assessing of premiums for workers' compensation—broadening the coverage, bringing the self-insurers into the collective liability plan, reordering the classification system with the inclusion of a minimum rate, and dealing with the problem of subcontractors—will, we believe, provide the major impetus for turning around the present financial problem at the compensation board, as well as providing fairness and equality for all workers and employers in the province.

CHAPTER 10

PROPOSALS FOR CHANGE: BENEFITS FOR INJURED WORKERS

I. BENEFITS FOR TEMPORARY DISABILITIES

1. Level of Replacement

Majority Opinion (King and Farrell)

The jurisdictions in Canada are evenly split between those which pay compensation based on a percentage of net income and those which pay on a percentage of gross income. All compensation boards in Canada had originally begun with the gross income formula (which has varied in percentage replacement of gross income). As a formula for replacement it is certainly administratively simple. For example, if a worker is earning at a gross pay rate of $200 a week, the compensation rate can be established by merely multiplying by 0.75, arriving at $150 a week.

The move toward a net income formula for replacement of lost wages began several years ago, with the realization that the gross income formula was unfair to many workers. For instance, income tax is based on a progressive approach, with high-income workers paying a higher rate of income tax than low-income workers. As well, there are deductions available to workers with dependents, which are not available to single workers. This leads to the single, high-income earner receiving a lower percentage of gross income by way of net than does the lower-paid worker with dependents. The following table illustrates the situation as it exists in Manitoba:

GROSS INCOME		WEEKLY NET INCOME*		
Annual	Weekly	Single Worker	One Child	Spouse and 2 Children
$15,000	$288.00	$228.00	$230.00	$259.00
20,000	385.00	288.00	290.00	321.00
25,000	481.00	348.00	349.00	381.00
30,000	577.00	406.00	407.00	440.00

* Assumes only standard deductions for income tax, Canada Pension Plan, and Unemployment Insurance Premiums. The calculation for dependent child deductions includes the taxable portion of the Family Allowance in the formula.

It can be seen from the above table that the single worker earning $30,000/year receives $406 a week in net take-home pay, or 70 per cent of gross pay. On the other hand, the worker with a dependent spouse and two children, with earnings of $15,000 annually receives 90 per cent of gross pay.

What is the effect of compensating workers on the bais of 75 per cent of gross income? The following table shows the same situation with the compensation rate included.

GROSS INCOME		WEEKLY NET INCOME		
Annual	Weely Rate of Compensation (75% of Gross)	Single Worker	One Child	Spouse and 2 Children
$15,000	$216.00	$228.00	$230.00	$259.00
20,000	284.00	288.00	290.00	321.00
25,000	361.00	348.00	349.00	361.00
30,000	433.00	406.00	407.00	440.00

Using several illustrations from this table, we note that the lower-income worker ($15,000/annum) with a dependent spouse and 2 children receives $216 a week workers' compensation to replace a net income of $259, or only 83 per cent replacement of net income. The single worker with the same income receives the same worker's compensation, $216 a week, to replace a net income of $228 a week, or a 95 per cent replacement factor. At the higher income level ($30,000 per annum), the worker with a spouse and two children receives 98 per cent of his/her net income through the compensation system whereas the single worker recieves 106 per cent. Clearly, the gross income formula is inadequate in recognizing the differences in take-home pay among various workers.

One solution to the problem of inequality in the present formula is to begin taxing workers' compensation benefits. This would even out the inequalities which presently exist. However, several significant changes would occur in the financing of the program and the ultimate end-point of the compensation dollar in the provincial economy. The first effect, on the financing of workers' compensation, would be felt when the new replacement level was determined. Recall that workers' compensation presently pays tax-free benefits at the level of 75 per cent of gross income. If the compensation benefits were to be taxed, there would have to be a higher replacement than 75 per cent in order to provide an equitable payment to workers. For the sake of argument, if 90 per cent replacement of gross income were chosen, employers would have to pay an additional 15 per cent premium. If 100 per cent of gross income were to be replaced, employers would have to pay an additional 25 per cent premium. These increases in premium would not result in any significant improvement in benefits to workers. The premium increases would be required in order to account for the taxation of compensation.

The second problem with taxing workers' compensation arises when you consider that there would be an outflow of revenue from the province to the federal treasury. As it stands now, compensation payments are tax-free, and the majority of the compensation payments remain in the provincial economy through expenditures on goods and services. If benefits were taxed, a portion of the money which now stays in the province would be taxed by the federal government and would form a part of its revenues. If any move were being made to tax workers' compensation, some sort of recognition of this fiscal change would have to be negotiated between provincial and federal officials.

We take no firm position on the taxation of workers' compensation except to say that if the right replacement level were established, if the employer funding arrangements could be agreed upon, and if the province were able to have the increase in federal revenues returned by way of agreement, the system would be easier to administer. Whether it is worth the difficulty in undertaking such negotiations and determinations is left unanswered.

Questioning the practicality of using the taxation model in order to even out the discrepancies in workers' compensation replacement, leads one to look at another alternative, i.e. moving to a net income replacement approach. As those who complete their own income tax returns are aware, the individual taxpayer is in a position to influence his/her ultimate taxation level through various means. Thus, contributions to Registered Retirement Savings Plans, charitable contributions, high medical expenses, etc., will lead to a lower tax rate. In Canadian jurisdictions which have adopted a net income approach, only three universal and standard deductions are considered. They are: Canada Pension Plan contributions, Unemployment Insurance contributions, and income tax payable. Of course,the latter consideration, income tax, varies with the status of the worker (single or with dependents). We believe that the net income replacement approach is fairer in providing compensation to the various individual categories of workers discussed.

RECOMMENDATIONS

105. We recommend that the present method of compensating workers on the basis of 75 per cent of gross income be replaced by a net income formula.

106. Further, we recommend that in calculating net income, only the three standard deductions—Canada Pension Plan, Unemployment Insurance, and income tax—be considered in the formula.

It is vital if a move is made to compensate on the basis of net income, that the system be made as simple and easy to administer as possible. The Workers Compensation Board will be required to prepare tables showing the level of deduction of the three programs for various income levels. In this way, workers and their advisors will be readily able to determine their own compensation rate and check it against the figure arrived at by the Workers Compensation Board. This is important because the move to net income complicates what has been a relatively simple procedure, calculating a compensation rate.

Similarily, the dependency status of a worker should be made as easy to confirm as possible. Some workers, in order to receive an income tax refund, will not declare dependents for income tax purposes until year-end. For compensation purposes, however, the dependency status may be important in calculating a compensation rate. We suggest a simple statutory declaration of dependents on the compensation form submitted by the worker at the time of injury. Quality control procedures could determine if there were any misunderstanding or abuse of this methodology.

RECOMMENDATIONS

107. We recommend that the net income formula be calculated annually by the Compensation Board and published in the form of a table outlining the compensation rates for the various levels of income and various combinations of dependency status.

108. We further recommend that all measures be taken to simplfy the reporting of income and dependency for use in calculating net income.

Once the basic decision has been made to adopt a net income approach for workers' compensation, an important question is the percentage level of replacement to be used. Unfortunately, our Committee could not reach concensus on this issue; Mr. King and Mr. Farrell recommend the replacemnt to be at 90 per cent of net income, while Ms. Donner dissents.

It is the view of the majority that a 90 per cent replacement of net income is preferable for several basic reasons. Firstly, there is the question of whether workers' compensation was ever intended to provide full compensation for all losses, i.e. to a no-fault plan which theoretically pays every claim irrespective of whether an injury meets the common-law rules of proof of negligence. Additional to the question of whether compensation was ever intended to provide full income replacement, is the question of whether the program **should** provide full replacement. We will not make the argument that too high a replacement level leads to an unwillingness of workers to return to work. The statistics prove that the vast majority of workers who are injured are off work only so long as instructed by their doctors, returning voluntarily when advised to do so by their doctors. The compensation plan could not work if experience was otherwise. We do express the view, however, that a compensation system is being fair, given the guarantee of no-fault converage to workers, by replacing income at the rate of 90 per cent of net income.

A second major consideration in choosing the figure of 90 per cent of net income has to do with the totality of recommendations made in the body of this Report. Although we have not costed all of our recommendations (for a combination of reasons, the Board's inability to provide certain raw data, the cost the Board placed on our receiving data, time constraints, etc.), we are aware that many of the recommendations will have costs involved. We do not apologize for this; indeed, we are convinced that the recommendations are needed to improve the system, especially as it relates to the treatment of long-term claimants. On the other hand, we believe that other of our recommendations will improve the efficiency of the compensation system, resulting in a savings over what is being presently expended. When taken in aggregate, we believe that the recommendation to provide replacement at 90 per cent of net income balances with the other recommendations in the total package.

On this point, we wish it made clear that the recommendation for replacement at the level of 90 per cent of net income will result in an overall **saving** of approximately 10 per cent when compared with the present formula of 75 per cent of gross. We base this statement on actuarial projections made in other jurisdictions which faced the same question of whether to move to 90 per cent of net. We mention this savings for two reasons. Firstly, the savings from moving to a 90 per cent of net formula should be offset by other of the recommendations which we have made. Secondly, if the government adopts the 90 per cent of net formula without adopting our other recommendations, or if the Board fails to institute our recommendations, there will be an approximate 10 per cent savings in compensation costs, without the counterbalancing improvements in program. We would be displeased to see that occur.

A third though less important factor in the decision to recommend 90 per cent of net is the argument that being off work is less expensive for the worker than being at work. The normal employment expenses (so goes this argument) of travel, meals, wear and tear on clothing, etc., are not paid out by a worker who is off work and on compensation. Thus, a replacement at less than 100 per cent of net is appropriate.

Finally, there is the consideration that all other provinces which have adopted a net income approach have chosen the 90 per cent formula. We realize that if the initial decision to choose 90 per cent of net was a bad decision, we will be following along with a bad decision. However, we do not believe that but rather are of the opinion that Manitoba should not be too far out of step with what is occurring in other provinces.

Mr. King and Mr. Farrell wish it known that they fully understand that replacement at 90 per cent of net income would mean that most workers would see a drop in their compensation payments on future claims. However, for the reasons previously outlined, they do not believe such a situation to be unfair.

RECOMMENDATION

109. Mr. King and Mr. Farrell recommend that replacement of income occur at the 90 per cent of net level.

Dissenting Opinion (Donner)

While I agree with my colleagues that the current method of providing compensation for temporary disability is not an equitable one, I disagree with their proposed solution because it, too, is inequitable. It imposes a financial penalty upon temporarily disabled workers (at minimum, 10 per cent of their net earnings), with a higher penalty imposed on those who earn more than the ceiling of approximately $40,000, proposed by my colleagues. This financial penalty appears incongruous to me, since the entire system of workers' compensation is intended to be a no-fault one. I find it contradictory, to on the one hand, promote a no-fault system and, on the other, impose a penalty on workers who become ill or injured "arising out of and in the course of" their employment.

My position, in brief, is that injured workers should be neither better nor worse off financially than their colleagues who remain actively employed. Ideally, I believe that this could best be accomplished by paying the full pre-accident gross earnings of injured workers in receipt of temporary total disability benefits, and continuing all of the normal deductions from those earning. This would require:

1) negotiating an agreement between the federal and provincial governments to allow continued contributions to the Canada Pension and Unemployment Insurance plans, both by and on behalf of injured workers.
2) continued contributions to all private pension and benefit plans.
3) the deduction of federal and provincial income taxes from temporary total disability benefits.

Currently, compensation benefits are not taxable, since they are not considered to be earnings for income tax purposes—hence the rationale to provide compensation as a percentage of net, rather than gross, earnings. It is argued by employers and by compensation boards, that the change to 90 per cent of net earnings is necessary to prevent over-compensation of a few injured workers who do, in fact, take home more at 75 per cent of gross then at 90 per cent of net earnings. However, this avoids what I consider to be the more fundamental point, i.e. the current practice of not taxing compensation benefits. This practice constitutes a significant saving for employers. If compensation benefits were paid on the basis of 100 per cent of gross earnings which were then taxable, I estimate that in 1986 the additional cost to Manitoba employers would have been $ 11,282,745. Most of this is foregone tax revenue, which is then collected by the federal and provincial government, from non-injured workers whose taxes are commensurably higher. In this way, non-injured workers subsidize employers by reducing compensation costs. At a time when complaints are sometimes heard that workers' compensation has become a "social safety net," with employers absorbing costs not appropriately allowed to an employment-based system, this fact should be kept in mind.

Recognizing, however, that such an ideal system is not likely to come into being in the near future, I propose what I consider to be the next best option: temporary total disability benefits should be paid at a rate of 100 per cent of net earnings.

My colleagues are not unique in believing the 90 per cent of net funds to be a fair proportion. As well as having the almost universal support of employers (the only exceptions being those who favour an even lower benefit level), this position is supported by most compensation boards and by The Association of Workers Compensation Boards of Canada.

These organizations argue that the 90 per cent of net proposal is fair in that it prevents over-compensation. What they do not often mention, is that it also represents an approximate saving to compensation boards of an estimated 10 per cent over the 75 per cent of gross earnings formula. The precise amount of the saving will depend on where the level of maximum insurable earnings (the "ceiling") is set. When the Saskatchewan Workers Compensation Board changed from a 75 per cent gross to a 90 per cent of net formula for the calculation of benefits, they concurrently increased the ceiling from $32,000 to $48,000 per year. They still realized a saving of ten per cent. In this way, injured workers in Saskatchewan have subsidized employers, since lower benefit levels mean less rapid increases in employer assessments.

The Manitoba Department of Finance kindly provided us with the detailed tax information necessary to make comparisons of the financial positions of injured workers under both the 75 per cent of gross and 90 per cent of net formulae (see Table 1) The only workers to benefit from such a proposal are:

1) single workers earning $40,000 or more per year, who would gain $1 per week or $52 per year.
2) workers with no dependent spouse and one dependent child, earning $40,000 or more per year, who would gain $2 per week or $104 per year.
3) workers with dependent spouse and two dependent children, earning $38,000 or more per year, who would gain from $13 to $32 per week or $676 to $1,664 per year.
4) workers with a dependent spouse and two dependent children, earning $18,000 and less, who would gain from $6 per week or $312 per year at $18,000 to $19 per week or $988 per year at $14,000.

Those who would see their benefits reduced under such a proposal are:

1) all single workers earning $38,000 and less per year. Those earning $32,000 per year would lose the most ($76 per week or $3,952 per year) under this proposal.
2) all workers with one dependent child, earning $38,000 and less per year. Those earning $32,000 would lose the most—$75 per week or $3,900 per year.
3) workers with a dependent spouse and two dependent children, earning between $25,000 and $34,000 per year. Their losses would range from $18 per week or $936 per year for those earning $25,000 annually to $44 per week or $2,288 per year for those earning $32,000 annually.

My proposal is outlined in Table 2. It stops the "over-compensation" so often noted by employers in their briefs, while at the same time ensuring that injured workers' benefits are not reduced. That is, injured workers are neither over-compensated nor under-compensated.

It is interesting to note the rather limited extent of actual over-compensation. The most seriously over-compensated workers under the current system are those single workers earning $32,000, who currently receive $32 per week or $1,664 per year more than they would under my proposal.

Whatever the stated goals of those who support the 90 per cent of net proposal, the result will be reduced benefits for most injured workers in Manitoba. The problem of "over-compensation" is best addressed, I believe, by paying injured workers in receipt of temporary total disability benefits 100 per cent of their net earnings, and ensuring that all pension and benefit contributions continue during the period of total disability. This would ensure that injured workers are neither better nor worse off than their non-injured co-workers.

There are three major arguments which have been raised against setting temporary total disability benefits at 100 per cent of net earnings. They are as follows:

1) the presumed need for an economic disincentive to stop "malingering,"
2) the argument that injured workers do not bear the normal expenses of employment, and
3) affordability for employers.

The economic disincentive argument hypothesizes that unless injured workers receive less in benefits than they would at work, they will have no incentive to return to work. I do not accept this hypothesis. I do not believe, from my reading of the relevant literature in rehabilitation, that this hypothesis has been empirically demonstrated. I believe that it is based on a rather simplistic, carrot-and-stick approach to human behaviour. For a multitude of reasons, including the need for social companionship, personal satisfaction and self identity, most of us want to work. The compensation system has sufficient authority to terminate the benefits of those who feign total disability, without imposing a blanket financial penalty on all injured workers.

It is true that injured workers do not bear some employment expenses. Auto expenses and lunch expenses, for example, may be reduced or eliminated. However, this should not be a consideration in the calculation of compensation benefits, except in those cases where the employer pays an allowance for expenses (for instance, a car allowance or per diem payment). Whether a worker drives to work, takes the bus or participates in a car pool, and whether s/he buys lunch or packs a lunch, is certainly a private matter. To some extent, therefore, expenses related to employment can be controlled by the individual. The worker who drives 50 kilometers a day to work, and the worker who takes a five-minute bus ride to the same plant to do the same job, will earn identical wages but will have very different employment expenses. Unless these expenses are acknowledged by the employer, in the form of a special payment, they should not be considered in the setting of compensation benefits.

Secondly, there are expenses associated with disability, for which compensation benefits are not paid. Injured workers often require assistance in activities such as snow-shovelling, home repairs and maintenance, etc. We have proposed, elsewhere in this Report, that permanently disabled workers receive an "independence allowance" to assist with those additional costs. However, temporarily disabled workers, and those not yet determined permanently disabled, would not receive this allowance. Under my colleagues' proposal, these injured workers would be forced to bear those additional cost, while, at the same time, receiving 10 per cent less in benefits than they would in normal, take-home pay.

Finally, employers argue that to pay more than 90 per cent of net earnings would make the system unaffordable. Yet, the 90 per cent of net proposal will not result in **reduced** social costs, but rather in a reallocation of costs, from employers to injured workers. It is they and their families who will bear the financial burden of any reduction in benefit levels.

In 1913 Sir William Meredith's *Final Report on Laws Relating to the Liability of Employers* was published by the Ontario Government. Meredith, in 1913, confronted the same arguments presented by employers today. His answer, written over 70 years ago, is still valid today:

> Half measures which mitigate but do not remove injustice are, in my judgment, to be avoided. That the existing law inflicts injustice on the working man is admitted by all. From that injustice he has long suffered, and it would, in my judgment, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the working man, but of what is the least he can be put off with; or if the legislature were to be deterred from passing a law designed to do full justice owing to groundless fear that disaster to the industries of the Province would follow from the enactment of it.

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*Meredith, W.K. *Final Report on Laws Relating to the Liability of Employer*, 1913, Ontario, p. XIX.

TABLE 1—MAJORITY PROPOSAL

GROSS ANNUAL EARNINGS	WEEKLY BENFITS*			
	75% of Gross**	90% of net***		
		Single	One Child	Spouse plus 2 Children
$10,000	$160.00†	$160.00†	$160.00	$166.00
14,000	202.00	194.00	195.00	221.00
15,000	216.00	205.00	207.00	233.00
16,000	231.00	216.00	218.00	244.00
18,000	260.00	238.00	239.00	**266.00**
20,000	289.00	259.00	261.00	289.00
25,000	361.00	313.00	314.00	343.00
30,000	433.00	365.00	366.00	396.00
32,000	462.00	386.00	387.00	418.00
34,000	462.00	405.00	406.00	**437.00**
38,000	462.00	**444.00**	**445.00**	475.00
40,000	462.00	463.00	464.00	494.00
42,000	462.00	463.00	464.00	494.00
44,000	462.00	463.00	464.00	494.00
48,000	462.00	463.00	464.00	494.00
50,000	462.00	463.00	464.00	494.00

* As of July 1, 1987. This data takes into account taxation changes as a result of the Manitoba 1987 Budget.

** Assumes the current ceiling of $32,000.

*** Assumes the proposed ceiling of approximately $40,000.

† Assumes the current minimum compensation rate of $693/month or $160/week.

TABLE 2—DISSENTING PROPOSAL

GROSS ANNUAL EARNINGS	WEEKLY BENFITS*			
	75% of Gross**	100% of net***		
		Single	One Child	Spouse plus 2 Children
$10,000	$160.00†	$166.00	$167.00	$184.00
14,000	202.00	216.00	267.00	246.00
15,000	216.00	228.00	230.00	259.00
16,000	231.00	240.00	242.00	271.00
18,000	260.00	**264.00**	266.00	296.00
20,000	289.00	288.00	**290.00**	321.00
25,000	361.00	348.00	349.00	381.00
30,000	433.00	406.00	407.00	440.00
32,000	462.00	429.00	430.00	464.00
34,000	462.00	**450.00**	**451.00**	486.00
38,000	462.00	493.00	494.00	528.00
40,000	462.00	514.00	516.00	549.00
42,000	462.00	536.00	537.00	570.00
48,000	462.00	592.00	594.00	631.00
50,000	462.00	611.00	612.00	650.00

* As of July 1, 1987. This data takes into account taxation changes as a result of the Manitoba 1987 Budget.

** Assumes the current ceiling of $32,000.

*** Assumes the proposed ceiling of approximately $50,000.

† Assumes the current minimum compensation rate of $693/month or $160/week.

RECOMMENDATIONS

110. **Majority Recommendation [King and Farrell]**

That workers' compensation benefits for temporary total disability be calculated on the basis of 90 per cent of net income. For the purposes of *The Workers Compensation Act*, net income shall mean regular gross earnings minus the employee share of Unemployment Insurance and Canada Pension Plan Premiums.

111. **Minority Recommendation [Donner]**

That workers' compensation benefits for temporary total disability be calculated on the basis of 100 per cent of net income. [She agrees with the above definition of net income.]

2. Income Ceiling

Majority Opinion (King and Farrell)

The present ceiling or upper limit of compensation coverage is $32,000 per annum. This figure is calculated by the Board, based upon the earnings of workers who file claims, and is intended to set a ceiling which assures that 90 per cent of workers recieve protection to the level of their full earnings. Although there are factors which prevent this formula from attaining the intended result (only time-loss claims are considered, and claims passed through the system before wage increases are counted), it gives a fair idea of the wages protected (those of 90 per cent of workers).

Any wage ceiling is, of course, arbitrary. Many reviews such as this have pointed out that, statistically, there is little or no need to have an income ceiling. The number of workers injured at the higher income levels is not great enough to raise the average compensation to any great extent. As well, by adopting a net income approach, the income tax levels will lower the compensation benefits payable to high income earners. Having said that, there is no board in Canada which has limitless coverage; the highest is presently $48,000/annum.

As mentioned earlier, any ceiling which is chosen is somewhat arbitrary. Various considerations are reflected in the majority recommendation. For instance, there was the level in the other provinces and territories to consider as well as the level of the present ceiling, and the belief of Mr. King and Mr. Farrell that the public would not want either too high or too low a ceiling.

Another consideration which has relevance to this decision is the method of setting the ceiling, and the method of reviewing the level of the ceiling on a regular basis. The present formula in the *Act* is unnecessarily complicated. We believe that the same end result could be achieved by adopting a formula which is based on a factor more easily attained, such as the average annual income of Manitoba workers. The present ceiling of $32,000/annum is, for instance, approximately 1.6 times the average annual earnings of $20,000.

A final point to make regarding the ceiling is that it should be rounded to the nearest multiple of $1,000 according to the recommended formula.

Mr. King and Mr. Farrell recommend that an income ceiling for workers' compensation be set at the nearest $1,000 multiple of twice the average wage in the province of Manitoba. (Given an approximate average wage of $20,000 per annum, this would represent a $40,000 ceiling for coverage recommended, versus the present level of $32,000.) We believe the calculation and adjustment of the ceiling should occur on an annual basis.

Dissenting Opinion (Donner)

I agree with my colleagues when they state that any wage ceiling, is by definition, an arbitrary upper limit on compensation benefits. However, I believe that their proposed ceiling of two times the Manitoba average industrial wage (or approximately $40,000) is too low.

Approximately 80 per cent of the Manitoba workforce works in service producing industries. The "average industrial wage" is measured by adding together the total wages paid in Manitoba and dividing that sum by the number of workers in the province, correcting for hours of work. Because service workers, who are included in this calculation, have tended to earn less than industrial workers, and because of the large number of service workers, the average industrial wage in Manitoba is skewed downwards. There are some groups of workers covered by *The Workers Compensation Act*, who currently earn more than $40,000 (for instance, miners and many skilled trades people), and I believe that these workers should not be financilly penalized. I believe that a ceiling in today's dollars, of approximately $50,000, would provide full compensation to most workers, while at the same time addressing the concern of those who believe that some limit must be placed on benefits.

I therefore recommend that the income ceiling for workers' compensation be set at the nearest $1000 multiple of two-and-one-half times the average industrial wage in the province of Manitoba. The calculation and adjustment of the ceiling should occur on an annual basis.

RECOMMENDATIONS

112. **Majority Recommendation [King and Farrell]**

That the income ceiling for workers' compensation be set at the nearest $1,000 multiple of twice the average wage in the province of Manitoba.

113. **Minority Recommendation [Donner]**

That the income ceiling for workers' compensation be set at the nearest $1,000 multiple of two-and-one-half times the average wage in the province of Manitoba.

114. **That the calculation and adjustment of the ceiling should occur on an annual basis.**

II. BENEFITS FOR PERMANENT DISABILITY

A vexing problem faced by workers' compensation theorists, legislators and practitioners across Canada is the design of an equitable payment to workers suffering permanent injury in an accident. Whereas most accidents involve only medical attention (with an eventual return to full employment and no long-term loss), permanent disabilities often involve loss of normal employment function. Compensation systems have been able to do a fairly good job of providing the make-up of lost wages (at a percentage level) and the payment of medical and hospital costs for short-term claims. In such cases, any complaints usually have more to do with administrative problems internal to the Board (delays, lost documents, etc.) than with any inability on the part of the designers to provide acceptable solutions. The situation of permanent disability, however, has not been as easy to deal with, and various solutions have been sought to the problem.

Prior to the 1970s, there was little experimentation in the area of permanent disability evaluation, with boards choosing (one assumes as much for administrative efficiency as for reasons of equity) a medical rating shcedule as the basis for establishing a permanent pension. The medical rating schedule assigns to a worker a percentage disability for the loss of function of certain body parts, equaling 100 per cent for some conditions (parapalegia, quadrapalegia, blindness, etc.) and moving downward from this level for lessening degrees of disability. For instance, the loss of a hand in a work injury results in approximately 50 per cent permanent compensation being assigned. It is not difficult to see how such rating schedules came to be given the title "meat charts" by those involved, measuring as they do the disability by the cut and by the pound. The medical rating schedule, such as it is, forms the basis for compensating permanent injuries in Manitoba at the present time.

Understandably, criticisms of this type of rating are widespread. While the schedule might provide a uniform, if arbitrary, measurement of loss of bodily function (or impairment), it does not, except by coincidence, measure the effect of the permanent injury on the functioning of the worker in employment, i.e. the disability. Consider the example of the loss of a hand in a work injury. The impairment (or loss of function) will be the same for two individual workers. However, the loss of a hand for a concert pianist and for a teacher will have two strikingly different effects in terms of ability to earn income. In the former case, the pianist will be effectively removed, for life, from the ususal employment. Quite likely, rehabilitation measures will be necessary in order to provide sufficient tools for this worker to return to gainful employment. A further likelihood is that the worker will have difficulty in ever regaining his/her former level of income. Yet, the teacher, after sufficient convalescence and recovery, will quite likely be able to return to his/her chosen career. The illustration, unlikely as it is in real life, should emphasize that the medical rating schedule, while useful in measuring physical impairment, has little or no bearing on the disability left with the worker as a result of the impairment. This basic contradiction, the inability of the medical rating schedule to define a worker's permanent disability, despite being put forward as such a mechanism, is the primary problem in its continued use.

A second criticism of the medical rating schedule and its application is that identical impairments receive very disparate awards because the percentage is applied to earnings at the time of injury. Thus, worker "A" earning $10,000 at the time of injury, and worker "B" earning $20,000 at the time of injury, both left with identical impairment ratings, will receive significantly different awards, the former getting only half the amount received by the latter.

The reason for these seeming anomalies is that the medical rating attempts to perform two functions—measure the physical impairment and measure the effects of the impairment (the disability)—but it does neither very well. When the courts deal with personal injury cases they separate the two harms to the plaintiff, using terminology such as "loss of amenities" to refer to the effects of the physical loss and dealing with the effect of wage-loss under a separate catagory. Theoretically, the "loss of amenities" portion of a court-ordered award is indentical for all individuals suffering identical losses.

It should be apparent that the contradiction of mixing both impairment and disability into one award has another major drawback. Consider the case of two workers with identical impairments—one who is able to return to full pre-accident earnings (the teacher in the previous example), and one who is not (the concert pianist). The former worker is able to enjoy the benefit of both full earnings **plus** the permanent pension. This worker receives an impairment award. However, the latter worker, who is left with a significant wage-loss, must use the award, in whole or in part, to supplement earnings. Therefore, the latter worker is left with much **less** in net benefit from the compensation system and no impairment award.

A corollary difficulty to the problem just described occurs when both workers suffer a recurrence of their injury and claim for further total compensation. The former worker, who was enjoying both earnings and pension, finds him/herself back at the level of compensation only, because the compensation system deducts the pension from the compensation payable. The latter worker, by contrast, may end up receiving more in net benefit on a recurrence of injury, especially if his/her earnings were quite low, following return to work. It can be seen that there are inducements built into such a system, whereby some workers are placed in a position of avoiding a recurrence because of negative financial consequences, while other workers are rewarded for having a recurrence of injury.

And finally, in terms of major considerations, permanent pensions of the type described are payable for the lifetime of the worker. While it is true that the impairment or physical effect of a permanent injury lasts a lifetime, it cannot equally be argued that the earnings-related portion of the disability lasts a lifetime, the vast majority of workers opting for retirement at some time in life. Any new design which attempts to rectify the problem with partial disability awards must take into account the distinction that impairment is for life, and disability is for normal working life.

Basic reform to this unacceptable situation began in British Columbia in the early 1970s with the introduction of a two-part system for compensating spinal cord injuries. The British Columbia Board, under the leadership of then Chairman Terrance Ison, reacted to the inherent weaknesses in the medical rating schedule and provided for a dual measurement to take place for spinal injuries. The first measurement was based on the medical rating chart and provided as a minimum award a pension equivalent to the medical rating. However, in addition to this calculation, the effects of the injury on the earnings of the workers were calculated and an enhanced or increased pension granted to workers with greater earnings loss than that recognized by the medical rating.

The British Columbia model had a distinct advantage over the previous medical rating method in that it attempted to rate both the **impairment** and the **disability** separately. However, the system still retained the shortcoming that the impairment rating had to be applied to cover wage loss. For example, the worker who returned to full employment enjoyed his/her impairment pension in addition to wages, while a worker who suffered loss of wages had to use the impairment rating to supplement wage loss. Given the legislative restrictions at the time, the British Columbia Board went as far as it was able to go in recognizing the distinction between impairment and disability, extending the concept of the dual award to other partial disabilities at a later date.

The Ontario government and Ontario Board reacted in a somewhat different fashion when the criticism of the partial disability awards emerged as a major issue in the 1970s. Rather than make changes to the medical rating chart or develop a form of dual purpose awards such as British Columbia had done, Ontario greatly extended the services of the Rehabilitation Department and also began granting temporary supplements to pensions.

The Ontario reform, welcome as it was to many workers, did not provide any long-term solution to the problem of partial disabilities. Rather, pressure was placed on rehabilitation services to assist far more injured workers than the service was capable of handling. This led to increases in expenditures with no real benefit (workers were not being retrained but merely placed on a holding pattern, albeit a paid one) for the long term. Workers who found employment at a lesser paying level than pre-injury, found their compensation reduced dollar for dollar earned. There was simply no incentive for rehabilitation.

In the context of what was occurring in British Columbia and Ontario, the first province to attempt a basic overhaul or reform of the system, calling into question the philosophy of workers' compensation, was the province of Saskatchewan in 1980. Commonly referred to as a wage-loss compensation, the Saskatchewan plan divided the benefit payable for partial disability into two parts: firstly, a lump sum award to compensate for impairment was made to all workers with a permanent injury, the same amount being paid for each impairment; secondly, a separate calculation was made to compensate for the wage loss caused by the injury.

By way of further explanation, the province of Saskatchewan has had a statutory review process in place for some years, which calls for the appointment of a tripartite Committee of Review every four years.

This Review Committee recommended major reforms to the existing pension model of compensation in its 1973 report. These changes were implemented by both the Board and by government. However, upon reviewing the matter four years later, the Committee (composed of some of the members who had taken part in the 1973 review) saw that the reforms recommended in 1973 had failed to solve the problem of partial disabilities, and they decided that drastic surgery was necessary in order to provide the equitable treatment which they believed workers deserved. Therefore, the recommendation for the implementation of a wage-loss compensation plan.

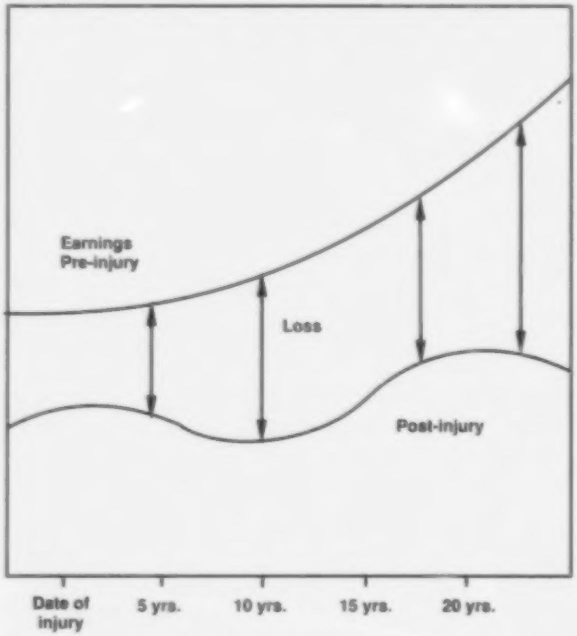
The two-part system in Saskatchewan starts with a lump sum to compensate for impairment. Medical rating charts are used, with all workers receiving an award for impairment that is equal for the same loss. When awarded, this lump sum for impairment becomes the property of the worker and is not deducted from or reduced in any way by other compensation which might be payable. For instance, a worker with total impairment would receive the full lump sum in addition to full wage-loss compensation if applicable.

The second part of the two-part system, the wage-loss portion, is payable to compensate for the economic loss caused the worker by the injury. In the simplest example, a worker who was earning $1,000 a month at the time of injury and who, because of the injury, must return to work at $600 a month, suffers a $400 a month loss. In such a case, the compensation system pays a percentage of this $400 loss as wage-loss compensation. The original plan in Saskatchewan was based on paying 75 per cent of gross salary loss. Amendments since 1980 have led to the loss being calculated on net income, with 90 per cent of the net loss being compensated.

Several other features of the Saskatchewan model are worth noting. Firstly, if a worker is in receipt of compensation (either total or wage loss) for a period of 24 consecutive months, it is assumed that he or she will have a long-term loss and, therefore, will suffer an ultimate loss in retirement pension. Using the previous example, a worker earning $1000 a month is able to contribute to retirement on full earnings of $1000. However, if s/he returns to work after injury earning only $600, it is apparent that the worker is unable to contribute towards his/her pension on that $400 a month s/he is losing. Therefore, the Compensation Board sets aside, in these long-term cases, an additional 10 per cent of **the compensation paid to the worker.** Such money goes toward the eventual purchase or creation of a retirement annuity when the worker reaches age 65, the point at which wage-loss compensation ceases. Interest earned by the Compensation Board on the money set aside for the worker is credited to the worker's annuity account, and should the worker die before reaching retirement age, the annuity fund becomes the property of the worker's estate. In the foregoing manner, it is felt that a close approximation of the worker's ultimate retirement security is maintained.

In addition to the annuity account, the earnings at the time of injury are indexed to increases in the cost of living. Therefore, when a worker ultimately returns to employment, the measurement of lost income is done against a figure (indexed pre-injury earnings) which has not been deflated. Such indexing occurs annually, on the anniversary date of the worker's injury. As well as being indexed annually on that date, a review of the worker's wage-loss situation takes place and any changes, upward or downward, in earnings loss is calculated. Thus, if the worker was able to increase his or her income to a greater extent than inflation, the annual review would result in a decrease in wage-loss payable. If, on the other hand, the worker did not enjoy as large a wage increase over the year as the inflation rate, there would be an increase in compensation payable for wage loss. The situation is schematized by the following graph:

FIGURE 1



There are at least three possible outcomes in the average wage-loss case. Firstly, a worker could earn less than inflationary increases in post-accident earnings over time. If so, the worker's wage loss payment would increase over time. Secondly, a worker could remain relatively stable vis-a-vis inflation and see very little increase or decrease in payment on each annual review. And finally, a worker could, through promotion and initiative, do much better than inflation and eventually work him/herself off of wage loss. The three possibilities are displayed as follows:

FIGURE 2

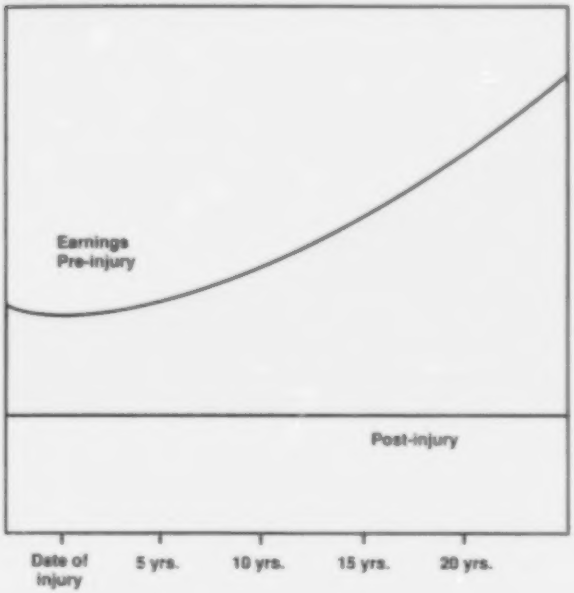


FIGURE 3

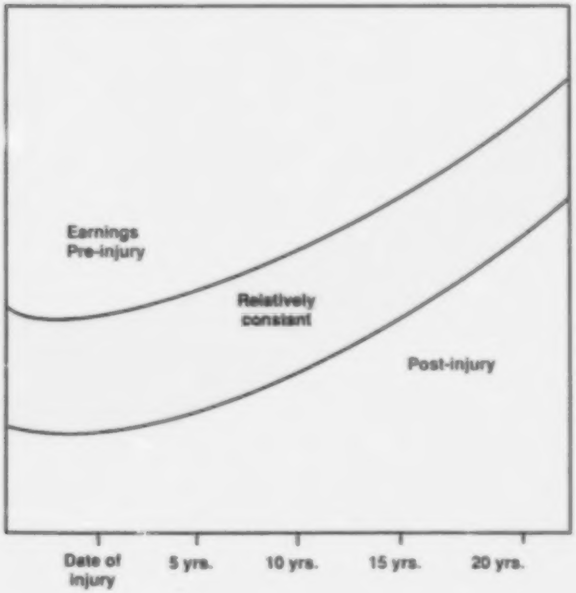
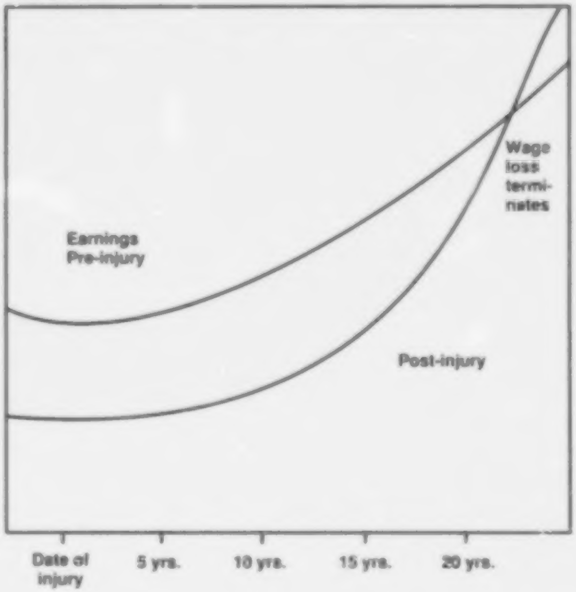


FIGURE 4



This latter example of a worker eventually losing wage-loss payments because of initiative in working back to pre-injury earnings, forms one of the strongest criticisms of the wage-loss model—the disincentive to rehabilitation. If a worker loses a dollar for every dollar that s/he earns, some argue that there is a stifling of the desire for self-improvement.

In an attempt to provide the Board with a tool to prompt initiative, the Saskatchewan *Act* allows the Board to "deem" what a worker is **capable** of earning in suitable employment. This means that if the Board feels that a worker is not earning to potential, the Board can "deem" him/her capable of earning more, thus reducing the wage-loss payment. We comment on the deeming aspect at greater length elsewhere in this Report, suffice it to say that this authority on the part of the Board has caused great controversy regarding the new law.

Finally, the Saskatchewan *Act* calls for reduction of compensation payments by the amount payable under the Canada Disability Plan after one year from date of injury. The logic of this move was the desire to have an integration beween two universal programs. Again, we will have more to say on this matter later in the Report.

The reforms in Saskatchewan caught the attention of compensation administrators and legislators from across Canada. Very quickly, New Brunswick implemented its own form of wage-loss; Ontario received a report recommending the same; and Newfoundland, the Yukon Territories and Quebec all developed programs of wage-loss compensation.

The jurisdictions of New Brunswick and the Yukon Territories legislated workers' compensation acts which were strikingly similar in design to that in place in Saskatchewan. Similarly, Professor Weiler's recommendations for reform to the Ontario compensation system followed the basic Saskatchewan model. But what these jurisdictions did recognize was that the lump sum for impairment paid by Saskatchewan was too small, starting as it did at a maximum of $15,000 for total permanent impairment. Although the Saskatchewan lump sum has since been increased to $20,000, in the other jurisdictions the amount is higher, with New Brunswick at $30,700, Newfoundland at $45,500 and the Yukon Territories at $25,000 (1986 figures); Ontario was recommended to begin at a $40,000 lump-sum level.

It was after the publication of the recommended reforms to the Ontario law in 1980, that criticisms of the new wage-loss system began in earnest. Suffice it to say, the removal of the **right** to a pension led the criticisms expressed from the perspective of the injured worker. Fear that the power which was to be given to the Board to **deem** income placed far too great a discretion in the hands of compensation administrators, resulted in pressure to not implement the Weiler reforms, which developed to the point that the Ontario government refused to make the substantive, program-design changes. Instead, several of the subsidiary recommendations were implemented, such as the creation of an external review body.

It was in the province of Quebec that the most thoughtful and reasoned approach to basic reform took place, with the passage of Bill 42 in 1985. Reacting to criticisms which had received a full airing in Ontario, the Quebec law attempted to circumvent the problems identified. Relying heavily on rehabilitation measures and a return to employment as a means of making the new concept work, the Quebec law gave workers the **right** to receive rehabilitation—something which is discretionary in other provincial laws. As well, within prescribed limits, the law gave workers the **right to return to their pre-accident employer**, following optimal recovery from their injury. These two rehabilitative cornerstones were felt to be vital in the avoiding of deeming which was being used in other jurisdictions in order to provide incentive, negative though it was, to return to work.

In addition to working on a method of allaying concerns about deeming, the Quebec Act deals with the problem of incentive for workers to improve their situation. Rather than the annual reviews of a worker's situation prevalent in other jurisdictions, the Quebec law calls for the first review to take place two years following a return to employment; the second, three years later; and finally, every five years thereafter.

It would seem to this Committee that vital to the proper working of the new Quebec law are the cornerstones of effective rehabilitation (through the provision of the right to receive same), and the right to return to the pre-injury employment following recovery. It is a general truism that employers polled in public hearings in Manitoba were very nervous about the right to return to pre-injury employment, not so much if the worker recovered fully from the injury, but more related to having to "carry" a worker who was unable to perform to full capacity.

In addition to the aforementioned changes to the basic design of the wage-loss system, the Quebec law went to the greatest lengths thus far in Canadian compensation law, to codify the various benefits payable to a worker following a work injury. Thus, for instance, clothing allowance, travel and living expenses, nursing home allowances, etc., are defined in the Quebec law rather than by board directive or policy.

We were fortunate to be able to travel to Quebec and speak with officials of the Quebec board, at some length regarding this new law. Unfortunately, experience with the new law was still too limited, for us to draw major conclusions regarding its effectiveness. And also, rumours abound as to changes which are to take place in the Quebec law, that may have far-reaching implications upon its effectiveness.

As a final review of the reform in progress, the third volume of Professor Weiler's Ontario reports has recently been released by the Ontario government. Specifically dealing with partial disabilities, the latest report provides for several changes from the original 1980 version. Firstly, the amount and method of payment of the impairment portion of the two-part award have been amended. Now recommending a $50,000 base for payment, the report projects this as being payable either by way of lump sum or pension. If by pension, the recommended presentation is for tying the amount to the average industrial earnings level of the province of Ontario. Thus, if the average wage in Ontario is $25,000 per annum, the recommended pension for permanent total impairment is 1/10 of that amount, or $2500 per annum, with percentages of that amount for lesser impairments. The report also recommends that the impairment awards be based on the American Medical Association ratings schedule, because it is considered fairer in its assessment of impairment.

With respect to the second half of the dual award, Professor Weiler continues to recommend an ongoing monitoring of the wage-loss situation of the worker through regular reviews, but suggests that they move to every three years rather than every year. In addition, he envisions that in certain cases (e.g., older workers and those wishing to emigrate), a more permanent establishment of the award be settled. Indeed, the uneasiness with the wage loss method is apparent in the report's recommendation that the Ontario board undertake extensive research, in order to determine whether an equitable method of establishing longer-term wage-loss **pensions** might not be developed.

Wage-loss plans measure lost earnings after the fact (increasing or decreasing the amount of the award at regular intervals), based upon the actual experience of the worker in employment. In British Columbia, the system measures the wage loss as a potential related to the age of the worker, the physical impairment of the worker, the education and language skills etc., and sets an award which lasts into the future. Such an award is prospective.

The distinction between the two types of compensation is vitally important because **we do not believe that the wage-loss model is workable in the long run.** Our conclusions in this regard are based on two factors. Firstly, we believe that the wage-loss model provides a built-in disincentive to effective rehabilitation. By way of explanation, under the wage-loss model a worker is reviewed regularly, and payment is adjusted according to the status of the worker at a given time. A worker who is able to significantly improve his or her earnings over time sees all the gains disappear through a dollar-for-dollar reduction in compensation payments. While we do not believe that many workers are manipulative, the concept of penalizing initiative and rewarding failure is practically guaranteed to bring about negative results. And despite attempts in other jurisdictions to obviate this design weakness, through lengthening the review period upward from annually, the basic structure still penalizes success.

One of the methods being used by compensation administrators to try to rectify the problem of incentive to rehabilitate is that of ascribing non-existent earnings to a worker, i.e.the practice of **deeming**. Deeming is carried out when a worker is not performing or earning to the standard which the compensation administrators feel is possible. For example, an injured worker who returns to employment at minimum wage is told by the compensation system that this is beneath his or her potential; therefore, the system will **deem** the worker capable of earning more. The net effect is a reduction in wage-loss payments to the worker.

We understand that under the British Columbia model, decisions are made as to what earning potential workers have, and pensions are based upon that calculation. However, even if modified deeming is used, the workers still have a positive incentive to earn to full potential, because no reduction will be made in their pensions.

This leads into the second major reason why we feel a wage-loss system will not work over the long term. Each member of this Committee, in his/her own personal way, picked up strong themes and variations of themes from the hundreds of injured workers who appeared before us at public hearings. One theme which struck home to each of us was the call by injured workers to be free of the compensation system, i.e. to end their dealings with the Board and to be allowed to get on with their lives. Existing programs in Manitoba to supplement the medical rating schedule can have the effect of regulating the lives of the workers far beyond what is acceptable to either the workers or to this Review Committee. Programs such as Rehabilitation job-search, wage loss and Special Additional Compensation have close similarities to the wage-loss pattern of close monitoring and follow-up on the lives of impaired workers. We were told in no uncertain terms (and we agree), that workers want to be independent, to have rights to compensation clearly established, and to be free to make decisions affecting their lives. We do not believe that a wage-loss model allows for this.

What, then, do we prefer? **Clearly, changes which have occurred over the past decade-and-a-half have been correct in separating the impairment and the disability.** There can be no argument that physical impairment is the same for all workers with the same loss. However, the logic breaks down when one tries to equate the physical impairment with the loss of earnings caused by that impairment. **Therefore, we believe that a two-part or dual system of awards which recognizes both factors separately, must be implemented. Secondly, we do not believe that the wage-loss method is workable or acceptable for Manitoba. Therefore, we opt for the prospective loss of earnings pension to compensate for wage loss.**

In particular, we nave the following recommendations to make regarding the compensation of permanent partial disabilities:

RECOMMENDATIONS

115. **That a dual-award system of compensating permanent partial disabilities be implemented, with one part recognizing permanent partial impairment, and the other part, a prospective wage-loss pension, recognizing the effects of the impairment on the earning capacity of the worker.**

We have previously outlined the need to separate the concept of impairment with the concept of disability. Only by setting up a system which recognizes each separately, will an equitable compensation be provided to workers.

116. That the basis for rating the impairment be the American Medical Association *Guides to the Evaluation of Permanent Impairment*.

In an excellent discussion of ratings schedules, appended to Professor Weiler's report for the Ontario government, Professor John Burton, in recommending the American Medical Association *Guides* as preferable to other schedules, arrives at the following conclusions:

1. The **AMA *Guides*** has clearer concepts as to what is being measured (i.e. impairment).
2. The **AMA *Guides*** is more comprehensive than other schedules.
3. The **AMA *Guides*** is more understandable by all parties.
4. The **AMA *Guides*** is more consistent in arriving at a similar rating for similar impairments.
5. The **AMA *Guides*** has achieved a higher acceptance level by doctors, employers, and workers than other guides.

Before we had received the third volume of the Weiler report and read Professor Burton's analysis, we had arrived at a similar conclusion. In arriving at that conclusion, we were influenced by the testimony of injured workers at public hearings, regarding their view of the shortcomings of the Manitoba Board's rating schedule. After having heard from scores of workers, we reviewed the Board's rating schedule and found that the document lacked thoroughness and completeness. Equally bothersome, is that the Board, until quite recently, considered the rating schedule to be a confidential document. It is very difficult for this Committee to understand how the Workers Compensation Board could uphold that position. If a worker or a worker's advocate wishes to question an impairment rating done by the Board, they are at a distinct disadvantage in **not knowing how the Board arrived at the rating in the first place.** One possibility was for our Committee to recommend that the Manitoba Board's rating schedule become a public document. While this would not have involved overcoming the limitations of the rating schedule, it would at least have allowed for informed agreement or disagreement with the Board's conclusions. However, the Board's rating schedule lacked the consistency and clarity of the **American Medical Association *Guides***. As well, we were concerned that workers being examined by doctors in Winnipeg, Lynn Lake, Moose Jaw and Moncton be viewed against a universally recognized standard. Thus, a report from a doctor in any of the above communities, based on the **American Medical Association *Guides***, would have equal value. We were pleased, therefore, to receive Professor Burton's more comprehensive analysis and so recommend the **American Medical Association *Guides*.**

RECOMMENDATION

117. That the award for impairment be based upon a $50,000-amount, with the award being paid (at the option of the worker), by way of a lump sum or pension.

A review of the present lump-sum amounts across Canada shows that $50,000 is the top end of the scale. While a comparison with other jurisdictions does not provide the total rationale for choosing the figure of $50,000, it must come into play in comparing systems. For Manitoba to exceed or fall below comparable awards in other provinces would call the entire dual-award concept into question.

For those who favour a higher amount, we have two suggestions: firstly review the lump sum available in a common-law action where fault or negligence must be shown, versus the compensation system of no-fault awards. If only $180,000 is available in the former system (with a strict burden of proof), a lower amount is justifiable under a compensation plan which provides the award to all. Secondly, the proposal for reform of permanent partial disabilities must be viewed in its entirety. Where some workers will receive less under the lump-sum system than they would with the old pension system, others will receive much more. The ones who are able to be rehabilitated and return to their former employment will still receive an award, albeit smaller than before. But those whose impairments bring devastating economic results will be much better protected.

118. That an escalator be applied to the lump-sum award so that it does not lose ground to inflation.

The $50,000 lump-sum award should be tied, in increments of $1,000, to increases in average salaries and wages in Manitoba. This does not mean that workers who opt for a lump sum should receive additional lump sums. However, the amount of the entitlement, in the *Act*, to a lump sum should be reviewed annually and escalated accordingly so that new injuries receive the benefit of a figure comparable to that granted for older injuries.

RECOMMENDATION

119. That a prospective wage-loss pension be set as soon after injury as possible, i.e. immediately after the following events have taken place: optimal recovery from injury, rehabilitation meas-

ures completed, and either a job found which suits the impairment or a determination made that the worker is unfit for further employment.

We have discussed the reasons why we feel that a pension is preferable to a reviewable wage-loss payment. The assured guarantee of a pension will allow workers to proceed back into a full and productive membership in society and the workforce, without having to fear for the loss of the award should they improve their earnings. This provides workers with a positive incentive for self-improvement. **Such pension is to be payable over and above the impairment award and is to be payable for the normal working life of the worker. The awarding of the pension is to be, of course, appealable at the time of awarding and at any time in the future that there is a dramatic change in circumstances, such as an increase in impairment.**

An equitable measurement must be made, in calculating this wage-loss pension, between earnings at the time of injury and earnings in new employment following recovery and return to work. This is obvious if workers are to see any **real** measurement of their wage loss. Therefore, **the earnings at the time of injury must be escalated by increases in average wages, before a comparison is done between pre- and post-injury earnings.**

RECOMMENDATION

120. That such wage-loss pension and impairment award, if taken by way of pension, is to be escalated annually, on the anniversary date of injury, by the increase in `average wages and salaries in Manitoba.

In choosing the average wage index over the cost-of-living index, we are of the opinion that workers in receipt of workers' compensation should be no better off, nor any worse off than their counterparts in the workforce. There have been historical periods where the Consumer Price Index has exceeded the increase in average wages, and vice versa. It would be an anomaly if workers on the job were to receive less by way of economic increase than workers on compensation.

121. That the practice of *deeming* income be used only in the most restricted and rigid way (see recommendation 77).

The best "deeming" available to any Board is an actual job. There are, unfortunately, situations where for one reason or another, a worker refuses to agree to accept what is considered to be suitable employment. Where the Workers Compensation Board can demonstrate that the preponderance of medical evidence shows a fitness for suitable employment, and where a worker refuses to accept same, there must be some methodology for reducing payments; and that is where "deeming" may come into play.

We would stress several things. **Firstly, if there is a substantive disagreement as to work restrictions, between the Board and the worker's treating physician, it makes sense and provides fairness if the dispute is referred to an appropriate, independent external specialist.** Thus, if the Compensation Board claims that a worker is fit for a suitable job, and clearly outlines the worker's physical restrictions and the physical duties of the job, a disagreement by the worker's treating physician would lead to referral to an independent, third medical opinion. We stress this point because one of the major grievances between workers and the Board arises over differing opinions between treating physicians and the Board's medical advisors. It does not have to be, nor should it be this way. The Workers Compensation Board Medical Officers should not be given final adjudicative authority.

Secondly, in choosing what is considered suitable employment, the ideal is for an agreement between the Board and the worker. However, in cases where the worker maintains that s/he is unfit for any employment, and where the medical evidence supports the Board, a suitable job should be identified. Suitable employment must first be within the physical restrictions placed on the worker by the treating physician. Many times in public hearings we heard from workers who were sent out to jobs which required them to do large amounts of bending, twisting and lifting. The physical restrictions imposed on the worker by the Board? No excessive bending, twisting or lifting!

A problem seems to have occurred in the rehabilitation process, whereby a job description for prospective employment was either incomplete, had changed over time or was simply not fully enough investigated in the first place. The frustrations of workers at being sent to what they are advised by the Board is an opportune position, only to find the expectations of the employer to be much higher, were obvious from the case histories which came before us. Therefore, a much more careful examination into the prospective job and the restrictions of the worker is necessary.

Thirdly, suitable employment is not a job which will be likely to cause a worsening or progression of the condition which necessitated change in the first place. Once a worker has an impairment, placing the worker back into employment which brings repetitive trauma to the injured part may lead to a short-term solution to a problem, but it will be much more costly in the longer run—both to the Board in increased future liability, and to the worker by way of health.

There are other considerations which we can outline in the area of suitable employment and the potential for deeming. We met in public hearings, workers whose language skills and education were limited. It is stating the obvious to say that such cases should be given special consideration. As well, we met other workers who were injured in rural areas and in smaller urban settings. It is wrong for the compensation system to move such individuals, without a clearly outlined plan for the future, including either a real training proposal or an actual job to come to. While we could continue on this topic at greater length, other areas of this Report deal with most of these concerns.

RECOMMENDATION

122. That an additional 10 per cent of all compensation payments for permanent disabilities be set aside by the Board to provide for a retirement annuity when the worker reaches normal retirement age. Alternatively, the present formula being used for Special Additional Compensation cases—that of basing a retirement award on 2 per cent of the monthly amount being paid, times the number of years of the award—should be applied to our recommended disability plan, if it proves to be more advantageous to the worker.

Recall that we had previously outlined the inability of a worker to contribute toward retirement on lost income. As well, recall that the wage-loss pension is payable only until normal retirement age. We feel strongly that a replacement for lost retirement income is necessary to round out our dual award proposal. Although not all workers have retirement pension plans (other than Canada Pension Plan), all workers who are fit and working have the potential to contribute towards retirement. If they are cut down by a work injury, they lose that potential and should have it replaced by the Board.

The 10 per cent annuity payment would be kept segregated by the Board for bookkeeping purposes, but would ultimately form a part of the entire accident fund of the Board. Interest earned by the Board on all reserves would be credited to the individual, worker annuity accounts on a ratio basis. Thus, if the Board's funds earned a 9 per cent return in a year, a 9 per cent interest payment would be made to the worker's account that year. Upon the worker's reaching normal retirement age, the lump sum of money would go towards the purchase of an annuity.

While we have no strong feelings one way or another about who should hold the annuity—the Workers Compensation Board or a private financial establishment—we would point out that the benefits under workers' compensation are non-taxable. Therefore, it would be a distinct advantage to the worker to leave the money in a Board-managed annuity account, and continue to receive payment from the Board, following normal retirement age. However, we are also aware that some workers will insist upon their right to have the annuity handled other than by the Board. We cannot strongly argue against that right.

Two final points have to do with deaths which occur before workers (who have an annuity account with the Board) reach normal retirement age, and with situations of very small annuities. Firstly, the annuity account belongs to the worker and is being set up in contemplation of replacement of eventual retirement benefits. Should the worker die before reaching normal retirement age, the annuity account belongs to the worker's estate. Secondly, there may be situations where only a very small, monthly annuity results from the combination of 10 per cent payments and interest. For the sake of efficiency, a figure should be chosen below which an annuity would not be paid, with the entire lump sum in the account going to the worker instead. Tentatively, we would suggest accounts below $5,000 be handled in this manner.

RECOMMENDATIONS

123. That workers aged 60 and over who are injured receive a minimum of five years' wage-loss pension, if applicable.

Many workers do not retire along with their fellow employees at normal retirement age. Some continue working into their 70s and a few into their 80s. Where an older worker is injured and has the right to a wage-loss pension, we recommend the arbitrary payment of five years' of wage-loss pension.

124. That the prospective wage-loss pension, once set, should be reviewed at the worker's request if a significant reduction in his/her income takes place at a later date.

For example, a miner may lose a hand in an accident at work. S/he would, under our proposed scheme, receive an impairment award. If his/her employer locates suitable, alternative employment, no wage-loss pension would be payable. If, however, some years later the mine were to shut down, the miner would be virtually unemployable because of the compensable injury. We wish to ensure that, in such cases, the prospective wage-loss pension would be recalculated.

125. That the prospective wage-loss pension take into account the special circumstances of younger workers. For example:

1) **a high school student working in a fast food restaurant, who is injured and suffers a permanent disability, should be compensated on his/her *true* prospective earnings as an adult, not on the earnings at the time of injury**
2) **a beginning trades apprentice, injured on the job, should be compensated on the basis of *true* prospective earnings as a journeyman.**

126. That Canada Pension Disability payments not be deducted from the wage-loss pension.

Canada Pension Plan is a nearly universal retirement program under the control of the federal government (with the provinces, except Quebec, having ceded authority in this regard). In addition to providing a retirement pension, there are survivor benefits available in the case of death, and disability payments (paid according to family size) for contributors who become disabled. We have carefully considered the question of whether benefits payable by Canada Pension for disability should be deducted from workers' compensation, finally deciding in the negative. Our reasoning follows.

First, the Canada Pension Plan is a joint contribution program, equally funded by workers and employers (present contributions of 1.8 per cent of wages, from each the worker and the employer, to a yearly maximum). Workers' compensation, on the other hand, is a fully employer-funded plan, for the historical reasons which we have previously discussed. It is very difficult, to say the least, to plan a rational integration between two such plans. To begin with, workers' compensation, under our recommendations, may pay only an impairment award and no long-term, wage-loss pension. Where workers' compensation does pay a long-term, wage-loss pension, it presumes a worker is back on the job or, in the limited circumstances outlined, has been deemed capable of working. Contrast these provisions with Canada Pension Disability which pays an award if a worker has a "severe and prolonged disability." The distinctions between the two plans should be apparent, with Canada Pension paying only in severe disability cases.

Secondly, Canada Pension Disability does not consider cause when determining entitlement. Thus, a worker may have one or several impairments (which are the responsibility of workers' compensation), along with a non-work related illness or condition. Canada Pension pays if the disability from one or all of these conditions is severe and prolonged. Workers' compensation, on the other hand, must try to determine what factors are employment-related and what factors are not employment-related. Examples abound, of workers with low-back impairment which, when combined with a condition such as heart disease or diabetes, makes them unemployable. It would be proper in such circumstances for Workers Compensation to pay for only the work-related condition (low-back impairment) and not the individual's other problems. However, Canada Pension pays for both. Therefore, if Canada Pension were to be deducted, these kinds of cases would tax the wisdom of Solomon in trying to apportion responsibility.

Thirdly, workers' compensation is a non-taxable benefit, while Canada Pension is a fully taxable income. Extreme difficulty exists in designing a fair method of differentiating between fully taxable dollars and non-taxable dollars, although some provinces have done so by considering Canada Pension as income for purposes of workers' compensation.

Fourthly, there are distinct differences in administration, between Canada Pension Plan and workers' compensation. While the former is controlled federally, having uniform, cross-Canada administration, workers' compensation is provincial and adminstered locally. The law and regulations under Canada Pension do not allow for the release of information to provincial bodies, such as workers' compensation boards. Therefore, if a provincial board is to offset Canada Pension under law, it must do so in a manner which is highly suspect in its interference with individual rights. For example, if a worker does not apply for Canada Pension, can a compensation board compel the worker to apply? One assumes not. However, some jurisdictions do have the authority to deduct the calculated amount of Canada Pension if a worker refuses to apply. This is, we suppose, the ultimate in "deeming." Once a worker does apply, either voluntarily or through financial compulsion, the second hurdle is reached. Canada Pension will not release to a provincial compensation board, the amount of a payment. Therefore, the board must, if it is required by law to deduct the benefit, have the worker volunteer the amount he or she is receiving. If the worker refuses to do so, the compensation board will begin deducting maximum Canada Pension benefits. We believe that this process is unwarranted.

A fifth reason for wishing to avoid the problem of Canada Pension offset has to do with distinct differences in payment by the various workers' compensation boards and by Canada Pension. Workers' compensation is essentially an income-related plan which pays benefits according to income and not family size. Canada Disability pays a basic amount to a disabled worker and thereafter considers family circumstances, such as whether there is a dependent spouse and dependent children. Questions arise as to what amount of Canada Pension should be deducted—the entire amount, only the amount payable on behalf of the worker, or some combination thereof.

Sixthly, Canada Pension payments vary over time rather considerably. We have already indicated that there is no sharing of information on individual cases between jurisdictions. This means that Canada Pension may vary—for reasons of cost-of-living increases, changes in dependency, etc., over the course of a year. For the workers' compensation system to keep track of such changes in entitlement is, if at all possible, highly impractical.

In the seventh instance, there are significant repayment problems which develop in attempting to integrate the two plans. Workers' compensation is a plan which pays from the day following injury, and (at least in theory) is to provide prompt and efficient payment. Canada Pension disability is not payable until three months after injury and, being centrally administered, often requires a good deal of time to arrive at a decision for cases in Manitoba. Thus, a worker may apply for Canada Pension shortly before the three-month waiting period expires. If it takes six months to make a decision, the award is paid retroactively to the worker. The compensation system, in the meantime, if required by law to deduct this money, faces the option of either deducting for Canada Pension before it is received by the worker, or trying to confiscate the entire retroactive award once it reaches the worker. Neither option is palatable.

The preceding outline attempts to show the frustrations involved for both the Board and the worker in attempting to integrate two totally different programs. We realize we may be criticized for our stance. However, the integration between two programs as unique and different as they are, cannot be carried out by one of the parties, either a province or the federal government. Reform must be based upon joint discussions of a kind which we understand have taken place and will continue to take place. We can envisage integration between the two systems if cooperation takes place at the administrative level and if program design changes are jointly agreed upon. We urge such discussion to continue.

Canada Pension has as its foremost function the provision of retirement income, and as an afterthought provides disability benefits. Workers who are injured in employment cannot continue to contribute towards their retirement through the Canada Pension Plan. Under an ideally-designed system, workers would continue to contribute towards retirement under the Canada Pension Plan, while receiving workers' compensation (income replacement). If this were to occur, the ultimate retirement income under Canada Pension would not be affected by a work injury. Administrative cooperation could lead to a rational melding of the two programs. Only Quebec, which controls its own version of the Canada Pension Plan, is able to undertake this. We believe that it can be worked out between federal and provincial officals over a longer time span. In the meantime, we see far too many problems with the offset of one by the other.

RECOMMENDATIONS

127. That other costs of disability presently being funded by workers' compensation continue to be funded.

A work injury often involves far more than the mere loss of salary. At the extreme, it can involve nursing care on a regular basis, home modification (ramps, enlarged doors, handrails), and automobile modifications. These are items which workers' compensation has long recognized and paid for. We foresee no discontinuation of this type of support.

128. That an independence allowance of $1,800 per year be paid to those injured workers who:

a) suffer significant permanent disability (i.e. 10 percent or greater), and

b) are ineligible for Canada Pension Plan Disability benefits, either for adjudicative reasons (they have returned to work) or for administrative reasons (insufficient years of contribution).

Those with permanent disabilities of 40 per cent or more should receive the full amount. Those whose disability is between 10 per cent and 40 per cent should be entitled to a proportionate share of the independence allowance which equals to their degree of disability, with the Board having discretion to grant a larger amount when warranted.

Since our recommendations would end the practice of awarding permanent pensions based on the present medical rating schedule, we will comment only briefly in terms of the winding down of the old system. Some comments are necessary because it will take time to implement the new system and there are a few practices which require changing while the old system is still in place.

To begin with, the Workers Compensation Board has a practice of awarding what they call **"token"** or **"functional,"** partial disabilities. They do this in order to recognize conditions which do not qualify for entitlement under their present medical rating schedule. Our point of view is relatively simple: if a worker has a measurable disability, it should be recognized as such, and an award given. If, on the other hand, there is no disability, an award under either of these two categories is not proper. Therefore, the types of conditions leading to a functional or token award should be recognized in the medical rating schedule.

Part of the problem with granting an award under the above headings is that the terminology is offensive to workers. If a disability is great enough to be measured, it is more than a "token" disability. On the other hand, some employers have expressed concern that such awards are granted by the Board, merely to qualify a worker for benefits under Special Additional Compensation.

RECOMMENDATION

129. **We recommend that the present medical rating schedule for permanent impairments be amended to include ratings for disabilities which are now termed as "token" awards or "functional" awards. The medical rating schedule should not provide for an award if there is no disability or impairment resulting from a work injury.**

We mentioned the usage of Special Additional Compensation in situations where there is only a minor disability. Such usage of Special Additional Compensation is proper **if** the disability causes monetary loss greater than that recognized by the pension. On the other hand, there is a clear tendency on the Board's part to use Special Additional Compensation **instead** of a permanent pension award. Looking at the distribution of permanent disabilities, it is apparent that very few workers are rated in the upper percentage brackets. In fact, in 1985, 72 per cent and in 1986, 82 per cent of workers rated for permanent partial disability received awards of 10 per cent or less. The overwhelming majority received pensions of 20 per cent or less, i.e. 90.6 per cent in 1985 and 94.1 per cent in 1986.

Information on the distribution of permanent partial disability awards was only available for the years 1985 and 1986. It is summarized as follows:

PERCENTGE AWARD	1985				1986			
			running total				running total	
under 1%	40	4.9%			87	13.1%		
1-10%	552	67.2%			452	68.3%		
11-20%	152	18.5%	592	72.1%	84	12.7%	539	82.2%
21-30%	41	5.0%	744	90.6%	21	3.17%	623	94.1%
31-40%	10	1.2%	785	95.6%	10	1.5%	644	97.3%
41-50%	13	1.6%	795	96.8%	5	0.8%	654	98.8%
51-60%	6	0.7%	808	98.4%	2	0.3%	659	99.6%
61-70%	5	0.6%	814	99.1%	0	0.0%	661	99.9%
71-80%	2	0.2%	819	99.7%	0	0.0%	661	99.9%
81-90%	0	0.0%	821	99.9%	1	0.1%	661	99.9%
91-100%	1	0.1%	821	99.9%	0	0.0%	662	100%
total			822	100%			662	100%

We believe that as long as the Board continues with a compensation model based on pensions rated according to a medical rating schedule, it should award such pensions in their full amount. **Special Additional Compensation should not be used as a substitute for permanent pensions, but rather as a supplement to them.**

RECOMMENDATIONS

130. We recommend that pensions continue to be awarded in the case of permanent disabilities until the new system is implemented, that the pensions fully recognize the level of the disability, and that Special Additional Compensation be used as a supplement to, and not a substitute for, such pensions.

As a final clarification of the transition between the present system and the recommended system, we note that Special Additional Compensation is limited to those workers injured during and after 1966. We encountered a handful of cases where real hardship exists because of this limitation. Although the number of these cases is small, the effect on individuals injured prior to 1966 is considerable, if they need Special Additional Compensation but do not qualify.

131. We recommend that the *Act* be amended to allow for Special Additional Compensation and wage loss benefits in pre-1966 work injury claims.

III. BENEFITS FOR SURVIVING SPOUSES AND DEPENDENT CHILDREN

An issue of major concern to Committee members during the review process has been the benefits provided to surviving spouses and dependent children following a work-related fatality.

A review of benefits provided in other jurisdictions reveals a wide range of benefit levels and delivery systems. While the Committee members are all dissatisfied, for a variety of reasons, with current provisions in Manitoba, none of the other jurisdictions offers a totally acceptable alternative. We believe that the workers' compensation system must assure sufficient income for survivors, without overt and restrictive discrimination on the basis of age or martial status.

After considerable reflection and discussion the Committee recommends that the surviving spouses of fatally-injured workers be provided with an amount of $175,000 to be paid either as a lump sum, or as a monthly pension payable for a minimum period of 20 years, as decided by the spouse. In addition to this, we also recommend payment of $225 per month for each dependent child, to age 18. While the child continues in post-secondary education, the payment should be increased to $325 per month in recognition of increased costs while attending university or community college.

As well, we believe that *The Workers Compensation Act* must also allow the Board sufficient authority to provide additional assistance, as necessary, in those exceptional cases in which the particular circumstances of the family may result in unusual need (for instance where the spouse or dependent child is disabled).

We believe that adoption of these recommendations will result in benefits which will allow young widows/widowers to become financially independent though retraining, while providing older surviving spouses with adequate income to support dependent children, without significant financial hardship. We recognize that it is unrealistic to expect that such a program of benefits could be implemented on a retroactive basis and that, therefore, survivor benefits currently being paid under existing legislation would remain essentially unchanged.

One significant exception, however, must be made with regard to section 27(1) of the current legislation, which is reproduced below:

> Marriage of surviving spouse.
> 27(1) Where the surviving spouse of a worker is receiving compensation and he or she remarries, and the board determines that the surviving spouse is dependent upon his or her new spouse for support, the board may terminate monthly payments to the surviving spouse, by upon so doing shall pay the surviving spouse a lump sum of $3,600.00.

The Committee is in agreement that this section of the *Act* must be removed as soon as possible for all existing and future cases involving fatalities. Not only is this provision in apparent contravention of the Charter of Rights, but it also could have the effect of forcing surviving spouses to make decisions about remarriage (particularly if there are dependent children), on the basis of the resulting loss in income. We feel that such situations must be avoided wherever possible.

The Committee also believes that section 27(5) of the *Act* is unacceptable. This section reads as follows:

> Diverting payments for dependent children.
>
> 27(5) Where the board is of the opinion that for any reason it is necessary or desirable that a payment under section 25 in respect of a dependent child should not be made directly to his parent, the board may make the payment to such person, or direct that it be applied in such manner, or both, as the board considers advisable for the advantage of the child.

We are confident that the Workers Compensation Board would not claim expertise in child welfare. However, this section of the *Act* provides the Board with the authority to perform as a child welfare agency, in assessing and determining whether the parent or guardian should receive the ongoing benefits for the dependent child. We believe this authority to be clearly inappropriate to the Workers Compensation Board. Such decisions should be left to the child welfare authorities who possess the appropriate mandate and expertise.

RECOMMENDATIONS

132. The Committee believes that the system of benefits currently paid in Manitoba to surviving spouses and dependent children needs improvement. Models used in other jurisdictions are unacceptable for a variety of reasons including age discrimination. Therefore, we recommend that the following benefits for survivors be adopted in all fatal injuries occurring on or after a date to be specified in legislation:

- **a) a sum of $175,000 to be paid to the surviving spouse, either in a lump sum or pension, as elected by the surviving spouse. The pension will be paid for a minimum period of 20 years to the surviving spouse or his/her estate.**
- **b) $225 per month to be paid to the surviving spouse for each dependent child, to age 18. Dependent children over 18, $325 per month while continuing in post-secondary education.**

The Committee members also agree that *The Workers Compensation Act* should allow the Board sufficient authority to provide additional benefits beyond those prescribed in cases of unusual need.

133. We recommend that section 27(1) of the current *Workers Compensation Act* should be removed as soon as possible, because it is in contravention of the Canadian Charter of Rights and Freedoms, and because it may discourage remarriages, due to possible negative effects on family income.

134. We believe that section 27(5) of the current legislation, which allows the Board to divert payments for dependent children from parents, is not appropriate within *The Workers Compensation Act*. Such decisions should be made by the appropriate Child Welfare authorities.

IV. EMPLOYMENT SECURITY

One of our major objectives is to see as many workers as possible, who are injured on the job, returned to the workplace, and preferably to their previous place of employment. We realize that this is not always possible, given the inherent limitations of some workplaces to accept workers with disabilities. We do not, however, believe that unnecessary impediments should be placed in the way of a return to work.

The province of Quebec, in its workers' compensation legislation, provides the **right** of a worker to return to the pre-injury employer, with certain practical limitations. One of the concerns of Manitoba employers during the public hearings was that this would be impractical, since many Manitoba employers may be too small or too restricted in their ability to find suitable work for a worker injured on the job.

However, after careful consideration about making a recommendation similar to Quebec's, we ultimately decided not to do so. Our reasons are varied and include some of the points made by employers during public hearings. We do have another concern, though, and it is that **a right to return to employment may be construed as an obligation to return to work.** We are concerned that workers not be returned to jobs which are not suitable, i.e. jobs which may aggravate or worsen their condition or disability, or jobs which may have little or no possibility of advancement because of the disability. Such workers should be assisted by the Rehabilitation Department to upgrade their skills or to be retrained in another field, and to locate employment which will not further impair their health or limit their potential.

Having explained our concerns about recommending a return to work, we should also explain that we are unhappy with a situation which apparently happens quite often; it appears that many workers are fired or simply not allowed to return to the job if they have a work injury. We do not believe that workers should be laid off or fired merely because they have been unfortunate enough to suffer a work injury. **There may be perfectly valid reasons for not allowing a worker to return to work with the pre-accident**

employer, but the mere fact of having been injured should not be one of them.

We considered recommending that the Workers Compensation Board be given the responsibility of ensuring that this does not happen. However, the Workers Compensation Board's strength rests in other areas. **Therefore, we recommend that the *Employment Standards Act* be amended to guarantee that workers not be fired for the sole reason of a work injury.** The administrators of this *Act*, The Manitoba Labour Board, have had much more experience with handling such matters, and would be better suited to ensure compliance.

There may be other impediments to a return to employment. One of these relates to seniority clauses in collective agreements between employers and unions. Another relates to making physical and other changes in the workplace, to accommodate the return to work of an injured worker. If we were to have recommended the right of workers to return to employment, we would had to have taken the next logical steps and recommended that such a right supercede seniority clauses in collective agreements, and that recommended rules be set, requiring employers to make the necessary physical changes in their workplaces to allow workers to return.

It is interesting to this Committee that few, if any, trade unions appearing before us at public hearings objected to the concept of waiving seniority rights, in order to provide the chance for an injured worker to return to employment. Similarly, all or almost all employers said that they would go out of their way to make changes in their places of employment to allow an injured worker to return. Both labour and industry uphold the worthy objective of wanting to see injured workers returned to the job, but both are apprehensive about what that might do to employer-employee relationships, collective bargaining, costs of doing business and senior workers who may have non-compensable disabilities.

We were pleased to note that some employers and unions have bargained clauses into their collective agreements, with no external compulsion, to provide for the return of injured workers to the workforce. These clauses promote a cooperative effort between the two parties to achieve this goal, which is what we advocate. Not all workplaces are unionized, however, and therefore do not have collective agreements. Consequently, we believe that the Workers Compensation Board should do much more to promote the cause of injured workers returning to their pre-injury employment. By meeting with the pre-injury employer and explaining the advantages of returning an injured worker (cost-savings, improved morale, worker dedication, etc.), we believe the Board could ensure that many more disabled workers could be returned to work. Where there is an organized workforce, the union should always be a participant in these discussions. In addition, the Workers Compensation Board may provide financial assistance to employers, to enable them to make the necessary changes to the workplace to accommodate disabled workers.

Although we are not going so far as to recommend that workers have an absolute right to return to pre-injury employment, we feel strongly that employers have an obligation to use all means at their disposal to bring injured workers back to the job, following recovery from injury. As well, we feel that trade unions have an obligation to waive seniority rules, in order to promote the same cause.

RECOMMENDATIONS

135. That the *Employment Standards Act* be amended to guarantee that workers not be fired for the sole reason of having had a work injury.

136. That the *Workers Compensation Act* be amended to provide that employers have the obligation, wherever reasonably practicable, to return an injured worker to the job following optimal recovery.

137. That *The Workers Compensation Act* be amended to provide that trade unions have the obligation, wherever reasonably practicable, to modify seniority clauses in their collective agreements, in order to accommodate the return to work of disabled workers following optimal recovery from a compensable injury.

These latter two recommendations are made in an attempt to seek a cooperative approach to a return to work for injured workers, rather than imposing a legal imperative that might prove unworkable.

V. EMPLOYEE BENEFITS

It struck the members of the Committee, while listening to the case histories of hundreds of injured workers, that the compensation program cannot replace certain benefits available to the worker through his/her employment. Among such benefits are plans which provide dental benefits, short- and long-term disability benefits, life insurance, etc. The need for such protection does not cease when a worker is injured and receiving compensation. Workers, spouses and children still require dental work. Non-work related illnesses and diseases still strike workers while they are on compensation, and the effects of these conditions may continue when the compensation board has fulfilled its responsiblity for covering the work injury.

We believe that employers should continue these major benefit plans following a work injury. There comes a time, however, when the effects of an injury may indicate the unlikelihood of a return to the pre-injury employer, and the worker may be required to make alternate arrangements.

RECOMMENDATION

138. We recommend that employers be required to continue major benefit plans for at least one year following a compensable injury to a worker. In the case of cost-shared plans, injured workers would be required to continue their portion of the premium payments.

VI. MEDICAL REMOVAL PROTECTION

Sometimes workers will contract conditions from their employment which, although not disabling in the normal sense, will require the worker to be off work so that the condition does not worsen, or so that they may reduce the level of toxic substances in their body to a safe level. An example of such a situation is in workers exposed to radiation in their places of employment.

The Workers Compensation Board of Manitoba has certain policies covering this situation (one of which, dealing with lead poisoning, is covered elsewhere in this Report). It is apparent that removing workers from such situations is, in the long run, in the best interests of all concerned. Workers benefit by protecting their health; employers benefit by preventing what might become a crippling condition,and thereby preserving the worker's health and reducing compensation costs in the long run.

We believe that the advantages to both sides are so obvious as to call for a guarantee in law. By advocating such a guarantee, we are not suggesting that such guarantee include the right for a worker to go on compensation automatically, but only if the employer is unable to provide suitable alternate employment, i.e. removed from any exposure to the hazardous substance(s) in question.

We were asked to consider that compensation be provided to workers forced to stop work because of an order from the Workplace Health and Safety Division. Presumably, such orders are issued if there is an immediate threat or danger to the health of workers, and in that sense it may have some bearing, if only potentially, on the workers' compensation system. There are problems with making such a recommendation, however. Firstly, our enquiry was into the workers' compensation system, and not into the Workplace Health and Safety Division which requires such orders. Secondly, we are not sure that all of the implications of such a potential recommendation are known. Therefore, we would prefer that this matter be taken up jointly by The Minister responsible for Workers Compensation and The Minister of the Environment and Workplace Health and Safety.

RECOMMENDATION

139. That *The Workers Compensation Act* be amended to provide compensation benefits to workers medically removed from their work, due to exposure to a workplace hazard. This amendment should specify that such benefits would be payable only in those cases where the employer cannot provide suitable, alternate employment.

VII. THIRD PARTY ACTIONS

Workers compensation law prevents a worker from suing his/her employer, another employer covered by workers' compensation, or a fellow worker or a worker of another employer covered by workers' compensation. There are circumstances, however, where the worker has a right of action against someone other than those listed above. In such cases, the worker must either claim compensation **or** bring an action. If the worker opts for compensation, then the right of action is transferred to the Workers Compensation Board which will determine whether or not to proceed with a third-party action.

Several other provinces have amended their law in this area, to allow a worker to both collect workers' compensation benefits **and** bring an action—the rationale that a disinterested third party should not be protected by workers' compensation law, which was set up to benefit employers and workers. It is a form of protection for third parties if a worker is unable to receive compensation while engaged in a lawsuit, if only that the worker may be discouraged by financial considerations, from proceeding with a lawsuit in the first instance; or secondly, if the worker proceeds with a lawsuit, having no income while the long process drags on. In this latter case, a smaller out-of-court settlement may be accepted by the worker than if the worker had some income.

In those jurisdictions where the right to compensation and the right to sue a third party are jointly available, the interests of the Board are protected by making the Board a party to the suit, and by giving it the right to recover its costs for the compensation paid on the claim. The worker retains anything above the costs to the Compensation Board.

We recommend that the law be changed to allow the worker to both collect workers' compensation and initiate a lawsuit against a third party.

We further recommend that the interests of the Board be protected by giving it the right to recover its costs on the claim, from the proceeds of the action.

RECOMMENDATIONS

140. That *The Workers Compensation Act* be amended to allow claimants to both collect workers' compensation benefits and to initiate lawsuits against third parties, i.e. against persons or companies who are neither employers nor workers covered by *The Workers Compensation Act of Manitoba*

141. That such an amendment also protect the interests of the Workers Compensation Board by giving it the right to recover its costs of the claim from the proceeds of such actions.

VIII. LEGAL ISSUES: THE CHARTER OF RIGHTS

A major concern for legislators in workers' compensation, as indeed in any area of enactment, is compliance with the Canadian Charter of Rights and Freedoms.[1]

The political decision to enact any or all of our recommendations in this Report will be, of course, the primary critical step in reforming the compensation system in Manitoba. It is only after that decision is made that considerations of Charter compliance will arise, in regard to any resultant new legislation. Generally in making our recommendations, we have attempted to bear the Charter in mind, realizing, however, that the ultimate responsibility in making the legal judgement call as to whether any particular enactment will likely comply with the Charter, belongs to the government, acting on the advice of its legal advisors.

In regard to the *Act* as it currently stands, we have several concerns about specific provisions, especially in light of section 15(1) of the Charter which provides that:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In making the following recommendations for the consideration of the government, we wish to emphasize that they should not be taken as comprising an exhaustive list of possible areas for legislative concern, but rather, represent our opinion as to, perhaps the most clear-cut instances of Charter violation in the present *Act*.

RECOMMENDATIONS

142. That sections 25(1), subsections (b),(c), and (e), 25(3), 25(4) and 25(6), be amended to provide the stated benefits to surviving dependent children until 18 years of age, rather than until 16 years of age.

The cited subsections provide as follows:

> 25(1) Where a workman died before January 1, 1974 as a result of an accident, the compensation payable to the dependents of the workman shall be as follows:
>
> (a). . .
>
> (b) Where the dependents of the workman are a widow or an invalid widower and a child or children under the age of 16 years, a monthly payment to the widow or invalid widower of $590.00 for life and an additional $133.00 in respect of each child under the age of 16 years.
>
> (c) Where the dependents of the workman are orphaned children, a monthly payment of $148.00 for each child under the age of 16 years.
>
> (d). . .
>
> (e) Where there is a dependent child of the workman
>
> (i) who is 16 years of age or more,
>
> (ii) who is applying himself to the satisfaction of the board in an elementary or secondary school course or in a course leading to a university degree or in a course of technical or vocational training acceptable to the board, and
>
> (iii) who has not been granted a university degree or completed a course of technical or vocational training,
>
> and it appears advisable to the board to furnish further or better education or training to the child, monthly amounts not exceeding

> (iv) $148.00 in respect of a child who is not an orphan, and
>
> (v) $163.00 in respect of a child who is an orphan,
>
> as the board, in its discretion may determine for the period that the child spends in furthering or bettering his education or training in a manner acceptable to the board up to the time he is granted a university degree or he completes a course of technical or vocational training.
>
> 25(3) Payments made under clause (1)(b) or (c) in respect of a child shall cease when the child attains the age of 16 years or dies, except that, where the child is an invalid at the time of attaining the age of 16 years, the payments shall continue until the child ceases to be an invalid.
>
> 25(4) Notwithstanding subsection (1), compensation may be paid in respect of an invalid child who is 16 years of age or more as though the child were under 16 years of age; but the payments under this subsection shall cease when the child ceases to be an invalid or dies.
>
> 25(6) The board shall not make any levy or assessment or order any deposit to be made in respect of compensation payable under clause (1)(e) until the child in respect of whom the compensation is to be or may be paid is approaching the age of 16 years and the board has decided that further and better education should be furnished to the child.

Dependency of these children is clearly presumed and is therefore automatic until the age of 16 years, after which their dependency is primarily judged by the factor of continued schooling. However, the *Family Maintenance Act*[2] of Manitoba and related family law legislation provide a legal entitlement to parental support until the age of 18 years, after which dependency is contingent upon continued schooling or invalidism.

It is our opinion that the differential treatment of groups of children under *The Workers Compensation Act* and *Family Maintenance Act* constitutes discrimination on the basis of age, under section 15 of the Charter, and denies equal protection and equal benefit of the law to children who are surviving dependents of workers.

The age of presumed dependency should extend until the age of 18 years, under all *Acts*, in order to prevent this discriminatory situation.

Amending *The Workers Compensation Act* in this regard could potentially result in a situation where a 16-year-old child in receipt of such survivor benefits could quit school, get a full-time job, move away from home (be, in fact independent) and yet continue to receive benefits until age 18. While such a potential situation could translate into actuality, it is perceived that such actual cases would be small in number, and unlikely to entail dramatic financial consequences to the Board. Such relatively rare situations are the necessary price of preserving equality before and under the law.

RECOMMENDATION

143. That the Board's diversionary power under section 21(5) be revoked, and that section 20 be amended to reflect the susceptibility to garnishment of workers' compensation benefits, already provided for in the *Garnishment Act*[3] of Manitoba.

Section 21(5) provides that:

> 21(5) Where a workman is entitled to compensation and it is made to appear to the board
>
> (a) that the workman is no longer residing in Manitoba, but that the workman's spouse or child or children under sixteen years of age are still residing therein without adequate means of support and are, or are apt to become, a charge upon the municipality where they reside or upon private charity; or
>
> (b) that the workman, although still residing in Manitoba, is not supporting his spouse and children as aforesaid and an order has been made against the workman by a court of competent jurisdiction for the support or maintenance of his spouse or family, or for alimony;
>
> the board may
>
> (c) divert the compensation in whole or in part from the workman for the benefit of the spouse or children of the workman; or
>
> (d) where a municipality is actually partially or wholly supporting the spouse or family of the workman, divert the compensation in whole or in part from the workman to the municipality.

The same Charter-related concerns, regarding the age of 16 years, as previously discussed, obviously are of concern here. However, quite apart from the Charter, we are of the opinion that the need for vesting such diversionary power in the Board has now passed, and that this section has been rendered anomalous in any event, by the development of new social and legal mechanisms which achieve the stated purpose.

Note that in section 21(5)(b), the Board's power to divert, has a precondition that a court order for support be in existence; but in section 21(5)(a), no such precondition is required. The only factual difference is the residence of the worker. A deserted family can now easily obtain a court order for support from a spouse residing in another jurisdiction. There is no good reason why a court order should not be a precondition in both situations.

Moreover, there is no reason why the Board should even have diversionary power in this situation. Where there is a court order for support, the *Garnishment Act* provides that workers' compensation benefits may be attached or garnished, overriding the prohibition against such attachment in section 20 of *The Workers Compensation Act*. There is no need to perpetuate such diversionary power of the Board in this day and age of widespread availability and enforcement of court orders for support. As for diverting compensation benefits to a municipality which is supporting a family on welfare, municipalities can look after themselves by getting an assignment of support paid under a court order.

We recommend amendment of section 20 of *The Workers Compensation Act*, so that the susceptibility to garnishment of benefits in execution of a court order for support will be readily apparent to all who seek to know their rights under the *Act*.

RECOMMENDATION

144. That the method of inflating a minor's average earnings for calculation purposes, contained in section 22 of the *Act* be revoked, as of April 1, 1988.

Section 22 provides that:

> 22 Where the workman was, at the date of the accident, under eighteen years of age, the amount of the weekly or other periodical payment may be fixed by the board by its first order, or at any subsequent review, on the basis of the earnings of an average workman aged eighteen years, employed at a similar class of work, or on any lower basis; but the payment shall not be lower than,
>
> (a) in the case of a first order, his average earnings at the date of the accident;
>
> and
>
> (b) in the case of a subsequent review, the average earnings which if he had not been injured, he would probably have been earning at the date of the review.

This section exists to remedy the financial consequences of the existence of a differential minimum wage law, whereby workers under 18 are paid less than adults. It is apparently a violation of section 15 of the Charter, on the basis of age, because differential treatment is provided for minors when calculating their average earnings. It is arguable, however, that the section, in fact, establishes an "affirmative action" scheme to ameliorate the position of disadvantaged, wage-earning minors. Characterized as such, section 22 may fall within section 15(2) of the Charter which exempts such programs from being found to be Charter violations.

However, whether a Charter violation exists or not, the reason for section 22's existence will disappear on April 1, 1988, when the differential minimum wage law is scheduled to cease. Thereafter, minors and adults will both earn the same minimum wage, so as not to infringe section 15 of the Charter. This being the case, section 22 should be revoked as of that date.

We have been advised that it is pursuant to this section that the Board purports to do the following: if a minor who is a learner or apprentice is injured, his/her earnings are assessed at the level of an 18-year-old who is a level above (i.e. a journeyman), and if it is a subsequent review, the earnings are assessed on the level which the injured minor would likely have achieved by that age, i.e. the Board does not merely make up the difference in minimum wage (if any), but actually assesses the claim on the basis of lost, potential income-earning capacity. It is our opinion that the Board is wrong if it does, indeed, purport to use this section for that purpose, since section 22 clearly states that the "adult" worker used for comparison purposes is one "employed at a similar class of work, or on any lower basis." This erroneous use of section 22 does not constitute a valid argument for its retention past April 1, 1988.

Our recommendations for the calculation of prospective wage loss pensions will, we believe, deal appropriately with the problems of young workers.

RECOMMENDATION

145. Those sections dealing with survivor benefits which discriminate on the basis of marital status should be amended to provide equal treatment.

This recommendation and the reasons for it are discussed and dealt with at length in Part III of this chapter.

FOOTNOTES

1. *Canada Act*, U.K. Statutes, 1982, c. 11, Schedule B, Constitution Act, 1982, Part I, Canadian Charter of Rights and Freedoms. (Hereinafter referred to as "The Charter.")
2. R.S.M. 1970, ch. F-20, as am.
3. R.S.M. 1970, ch. G-20, as am.

CHAPTER 11

PROPOSALS FOR CHANGE

THE STRUCTURE OF THE WORKERS COMPENSATION BOARD

Testimony, at public and in camera hearings and through investigation, showed a widespread concern with the constitution of the Workers Compensation Board of Commissioners, the method of appointing the Board and (not surprisingly, given their role in adjudicating claims, setting assessment rates and developing policy) the individuals comprising the Board. At present, three full-time members make up the Board—a Chairperson, and two Commissioners representing industry and labour. Such a tripartite format, balancing the interests of workers, industry and labour respectively, through the good offices of a third party, is widely recognized in industrial relations circles as being the best model for problem solving or dispute-resolution (be it by way of arbitration boards, conciliation boards or labour relations boards). **Given the tripartite model's long and successful history of dealing with management and labour issues, and given the success over time of the model's usage in workers' compensation, we feel that this model should continue in Manitoba.**

However, reaffirming the tripartite model does not mean acceptance of the status quo. Criticisms of present arrangements have to be dealt with, and solutions sought to the criticisms that were voiced.

The Workers Compensation Act outlines how the Board is to be structured and established, requiring the Lieutenant Governor in Council (the Provincial Cabinet) to appoint "a chairman (sic) and two more commissioners" to a commission which is to oversee the *Act*. The Chairperson is appointed full time and holds office at the pleasure of the Lieutenant Govenor in Council, but may be removed at any time for cause. The Commissioners (two at present) may be appointed either full time or part time. All members of the Board who devote themselves full time to their duties are required to divest themselves of any holdings in any companies which are subject to the *Act*. This stricture, although a very powerful tool in reducing possible conflicts of interest, may limit the quantity and quality of potential candidates to serve on the Board. Salaries for Board members are set by the Lieutenant Governor in Council.

Once appointed, the Board members usually seek to reach agreement on all matters through a process of consensus. However, a majority decision of the Board becomes the Board's decision; and with the present complement of three members, a vote of any two members becomes the decision of the Board. There is no prohibition against a dissent from the majority decision, and majority/minority positions are possible. However, the current Board has adopted a policy which prohibits the publication of dissenting opinions.

The importance of the Board in the workers' compensation system cannot be too strongly stressed. Although it is government which sets the overall theme for the program, through its mandate as legislative authority (all amendments to law must come from government) and its mandate in appointing the Board, this same Board (once appointed) has remarkable responsibility, authority and jurisdiction. It is the Board which is to oversee the raising of millions of dollars from employers, through its ability to tax or assess; it is the Board which is to set all policies which guide the hundreds of employees administering a complex and difficult Act; and it is the Board which holds the future of those who claim benefits in the balance, being the final adjudicative authority on all claims.

Emphasizing this importance is the general description of jurisdiction of the Board, as outlined in section 51(1) and (2) of the *Act*, as follows:

> **General jurisdiction.**
>
> **51(1)** The board has exclusive jurisdiction to examine into, hear, and determine, all matters and questions arising under the Part and as to any matter or thing in respect of which any power, authority, or discretion, is conferred upon the board; and the action or decision of the board thereon is final and conclusive and is not open to question or review in any court; and no preceedings by or before the board shall be restrained by injunction, prohibition, or other process or proceeding in any court, or are removable by certiorari or otherwise into any court.
>
> **Particular jurisdiction.**
>
> **51(2)** Without hereby limiting the generality of subsection (1), it is declared that the exclusive jurisdiction of the board extends to determining
>
> (a) whether any injury or death in respect of which compensation is claimed was caused by accident within the meaning of this Part;
>
> (b) the question whether any injury has arisen out of or in the course of an employment within the scope of this Part;
>
> (c) the existence and degree of disability by reason of any injury;
>
> (d) the permanence of disability by reason of any injury;

(e) the degree of diminution of earning capacity by reason of injury;

(f) the amount of average earnings;

(g) the existence, for the purpose of this Part, of the relationship of any member of the family of a workman as defined by this Act;

(h) the existence of dependency;

(i) whether or not any industry or any part, branch or department, of any industry is within the scope of this Part, and the class to which any industry or any part, branch, or department, of any industry within the scope of this Part should be assigned;

(j) whether or not any workman in any industry is within the scope of this Part and entitled to compensation thereunder;

(k) whether any particular disease is peculiar to, or characteristic of, any particular industrial process, trade, or occupation, to which this Part applies;

(l) that a person who is not otherwise a workman for the purposes of this Act shall be deemed to be a workman for the purposes of this Part and, where the person is not under a contract of service or apprenticeship

(i) that another person shall be deemed to be his employer, and

(ii) what his earnings shall be deemed to be, for the purposes of this Part.

Given such independence, power and authority, it is not surprising that the structure and accountability of the Board should come under question in a series of public hearings such as those which we held.

In arriving at our recommendations for change to the present structure of the Board of Commissioners, we kept several factors in mind, foremost among those being the need for an independent Board. The theoretical model of an independent Board having final authority on all matters is vitally important for the health of the compensation system. Board members are under a constant lobby from various interest groups, including employers, trade unions, injured workers and government. Employers, on the whole, wish to see their assessments spent wisely. Indeed, this often equates into a desire to see the taxation or assessment rate kept low, since most employers feel that higher assessment rates produce a negative, business climate. Thus, a liberal interpretation of the law, leading to an expanded scope of coverage by the Workers Compensation Board, is equated with an eventual increase in the total amount of money needed to pay for the program. Employers, therefore, see it in their own interest to lobby (through Board members, government and the media) for stricter control over law and policy, and over claims adjudication and administration, with the ultimate goal being a control of cost.

Organized labour, on the other hand, working on behalf of their members, see it as their responsibility to argue for a more liberal approach to accepting claims and paying injured workers. Recall that workers' compensation legislation removes the right of workers to sue their employers for negligence in a work injury. Trade unions, cognizant of this historical removal of rights and its replacement by workers' compensation, are more aware than most of the need to keep expanding workers' compensation, if only to keep up (in a relative sense) with the ever-evolving changes in tort law. Thus, a similar lobby to that by employers (although with the opposite objective) is effected by trade unions.

Injured workers (representing the largest group in sheer numbers) who have an interest in workers compensation, have another lobby function—usually that of their own claim. For an injured worker whose major source of income or potential income is workers' compensation, the decision of the Board is no theoretical or academic decision; it is real. Indeed, in many cases it may be the most important decision ever to be made about that worker's life. Therefore, negative decisions by the Board often lead to efforts on the part of injured workers to achieve influence elsewhere, either through publicity or through political pressure.

Government is caught somewhere in the middle of these opposing pressures. It has, on the one hand, employers arguing for lower rates of assessment and more financial accountability on the part of the Board, while on the other hand labour organizations argue for more liberal laws and Board policies. Added to industry and labour lobbies are those of injured workers who seek redress, both from perceived and real injustices on the part of the Board. Because the problems posed by all three lobby groups are complex (requiring a good deal of investigation, discussion and decision-making), government simply cannot handle them alone—therefore, the need for an independent Board.

We are not so naive as to believe that a Board can operate in total isolation to the views of the government in power at any given time. The views of a society change, and with this change often comes a change in government. Whereas one regime may feel that a very strict interpretation of the law is necessary for the workers' compensation program to reflect its general viewpoint, another government might feel equally strongly that a more humane interpretation of law is required. It is within these very broad and non-specific terms that a Board usually exercises its independent mandate. However, all specific issues of policy and interpretation of law must be dealt with by the Board in an independent manner.

The perception of the Board by some in Manitoba is that the necessary degree of independence is lacking. To what extent perception equates with reality is difficult to say. It is public knowledge, however, that government has been involved in approving the annual increase in assessment rates for the past several years. This public linkage between government and the Board on this one issue cannot help but leave the impression in some minds that there is linkage on many other fronts, be it from the hiring of new staff to the adjudication of individual claims.

Quite simply, every individual or organization which has dealings with the Workers Compensation Board has the absolute right to expect and receive a fair and impartial hearing. This applies equally to an injured worker who is arguing for acceptance of a claim, an employer who is arguing for a different assessment class, or a trade union arguing for a new policy. Employers and/or trade unions will stop trying to reform the system from within, if they feel their arguments are not receiving full and careful attention by an independent Board. For example, if injured workers come to believe that more is to gained by an approach to the political level than through an appeal to the Board, they will take the former route, causing a breakdown and a slowdown of the proper appeal system, and will be left with unwarranted hope where a degree of finality is more helpful; and elected representatives become burdened with cases which are difficult to comprehend, let alone resolve.

A second factor that influenced our deliberations regarding a new Board structure was an awareness that the Board has various roles to perform, and that any proposed structural changes should reflect those various roles. Foremost in importance with any Board should be the adjudicative function. The future of many individuals and organizations hangs upon the decisions made by the Board. Unnecessary delays in reaching those decisions are to be avoided; equally unacceptable is the overtaxing of the ability of the Board to properly provide reasoned and objective decisions. Therefore, the structure of the Board of Commissioners must be such that it can handle the adjudicative function with both speed and thoroughness.

But the Board of Commissioners is not only responsible for adjudicating claims. It has a major role to play in the strategic planning, the public relations, and the broad policy guidelines which are to be adopted by the organization. This latter issue—responsibility over policy-setting—leads, when combined with the adjudicative role of the Board, to the classic dilemma in the workers' compensation in Canada. Simply stated, the question is whether the same Board which sets policy on one day, can turn around the next day and adjudicate a claim fairly and in accordance with the law, particularly when that claim may fall within the ambit of the policy just struck. Stated somewhat differently, observers often question whether the body responsible for raising money to pay for the program, can forget that role in later ruling on a precedent-setting claim which may have extensive financial implications. The response in most Canadian jurisdictions is to leave with the Board of Commissioners both roles—that of policy-setting and that of adjudication—on the grounds that fair individuals can separate the two issues, and that externalizing or removing the appeal function leads to a more adversarial compensation system. Although the appeal function of the Board of Commissioners is dealt with somewhat later, in this respect it is important to keep in mind this basic dilemma in considering an alternate structure for the Board.

As a final consideration, we believe that the history of the compensation program in Manitoba is necessary to keep in mind, along with the need for some continuity in times when change is needed at the Board level. With respect to history, Manitoba worked under a system of a full-time chairman and part-time commissioners for some time. Argument has been made that this arrangement was unacceptable for various reasons. Foremost among those reasons is that the part-time members of the Board lacked a full knowledge of what was going on in the organization, and at least one of the major players in workers compensation would find the move back to a part-time Board a regressive measure. We have to agree that moving to a part-time Board does, by design, place far more power in the hands of the bureaucracy at the Board, and may result in a Board of Commissioners which is forced to make decisions based upon an imperfect understanding of pertinent facts.

On the other hand, a full-time Board which spends too much of its time on administrative detail may have the potential for equally unsatisfactory results. One of the practices which struck this Committee as being somewhat odd, was the present practice of assigning each Board member an area of interest within the organization, with changes occasionally being made in the particular area of interest which is the responsibility of any member. For instance, one Board member may have the Claims Department and Finance Department as his/her area of interest for a six-month period. During this interval the Board member at-tends meetings of the assigned departments, oversees decisions made in the departments and generally attempts to learn (in some detail) the functioning of the departments. Learning more about the workings of the compensation system, including the practices and procedures of departments, is not a bad thing in itself. However, through discussion with senior staff at the Board, we believe that the process involves more than learning, and extends to advising and directing. Such action cannot help but undercut the role of senior staff and mitigate against the development of strong and efficiently-functioning departments. When you add to this the fact that two often-opposing points of view (i.e. those of industry and labour) are represented at the Board, the picture emerges of a department which may need to redefine its function, depending upon which particular Board member is serving as "Commissioner of Interest" at any given point. **The process of Board members having one or more departments as their area of special interest should, in our opinion, cease.**

Our recommendations for change in the structure at the Board of Commissioner level involve the creation of a Board with a mixture of full-time and part-time members. As previously outlined, we agree with the tripartite model; indeed, we would go so far as to state that the law should be amended to require a tripartite Board of Commissioners. The reason for believing that the law must be more precise in this area comes from our knowledge of events in the other jurisdictions, where two of the major participants—industry and labour—thought they had a tripartite Board, only to have government appoint additional Board members who were representative of neither interest group. The recent report of the Saskatchewan Review Committee deals with this very issue in recommending that the law be amended along lines we are suggesting—guaranteeing a balanced Board.

We recommend a Board of Commissioners, with a mixture of full-time and part-time members as follows:

- **one full-time chairperson**
- **one full-time labour member**
- **one full-time industry member**
- **two part-time labour members**
- **two part-time industry members**

This new Board, consisting of seven members in total, would, we believe, overcome the criticisms and meet the needs of a dynamic organization like workers' compensation.

With respect to the independence of the remodelled Board, we believe that the four part-time members who do not rely on continued employment with the compensation system for their livelihood, counterbalance the three full-time members who, some argue, are bound by "golden handcuffs" in their decision-making. The four part-time members, who presumably continue in their positions in industry and labour, are theoretically more independent in their ability to present arguments and to follow their conscience than are the full-time Board members, whose role has been criticized as lacking the necessary independence. In addition to their independence in decision-making, the part-time members contribute two other qualities—accountability to their constituents, and freshness of perspective. One of the complaints raised in public hearings is that Board members are not accountable to anyone for their decisions. Such an argument is ultimately paradoxical, in that a Board cannot be independent if it is directly accountable to another body, such as the Public Utilities Board, as was suggested by some employers. However, Board members who spend only a portion of their working time on Workers Compensation Board matters (with the bulk of their career remaining in the business world and labour world), must defend directly to their colleagues, associates and peers the decisions made by the Board. As well, the part-time Board members are better able to defend against the temptation to become insular and inward looking to the detriment of freshness of viewpoint and ideas, i.e. they do not face as much danger of being coopted by the system.

We believe in the need for the full-time participation, for a variety of reasons. Previously we noted the historical problem of groups feeling that the bureaucracy of the Board becomes too powerful without the presence of Board members who know the program thoroughly—its history, its philosophy and its day-to-day operation. As well, there is the need for a Board to be present on more than just a part-time basis for adjudicative functions. We have noted elsewhere in this Report, the necessity for speed in decision-making in workers' compensation, the delays that presently exist in the appeal process and our wish that such delays be minimized to the greatest extent possible. The full-time Board would serve to enhance the streamlining of appeals. There are additional factors which lead us to recommend the continuance of full-time members. These factors relate to the public relations function of the Board, the complexity of workers' compensation, the rapid evolution and change that is taking place across Canada in the program, and the need to develop expertise at the Board level about such matters. One of the major functions for our recommended full-time Board would be to educate themselves on workers' compensation, and to spread this knowledge and expertise by means of an expanded public relations role.

We had very little indication in our public hearings and research that the present Board structure allows time for public relations.

In terms of actual functioning, the expanded Board would need to have certain rules laid out in law and certain rules laid out in formal procedures. For instance, the larger Board (seven members) would require a different quorum than at present. As well, we are recommending a different appeal structure (see Chapter 12); and the quorum for an Appeal Board would differ from that of the full Board. **As we envisage the design, the larger Board would have responsibility for all matters pertaining to policy development and approval, strategic planning and other important major decision-making. The full-time Board would be responsible, through the Executive Director, for the implementation of policy and the development of background papers and discussion papers, as well as for public relations, interim decision-making (between full Board meetings), and a good deal of the adjudication.**

Several other administrative matters will be dealt with before turning to the question of the Board's function in the appeal process. It would seem wise to provide for one additional alternate appointment from both the labour and industry constituencies. Although the alternate would not be a sitting member of the Board, s/he would be able to fill in and serve in the absence of one of that constituency's representative members. We see the need to keep a balance in all decision-making, and so we recommend a quorum at all Board meetings, of at least two labour representatives, two industry representatives and a chairperson. Part-time Board members would likely have to meet only one or two days a month (or two days every other month) to deal with the items on their agenda. However, there would be consultation at other times, meetings to prepare for, and agenda items to deal with outside of formal meeting times. Therefore, we recommend a form of honorarium and per diem to compensate part-time Board members.

We trust that the implications of our recommendation for part-time Board members is understood in another context. One complaint about existing Board structures across Canada is that the positions are not highly enough paid nor stimulating enough for full-time acceptance by all prospective candidates, and that they require the candidates to divest themselves of all interests in companies coming under the *Act*, if appointed full-time. **We believe that providing part-time Board positions will result in a far greater willingness on the part of leaders in the business and labour communities to serve on the Board—a factor which should greatly improve the Board's image and effectiveness.**

A final word about the proposed new structure has to do with the tendency of newly elected governments to effect wholesale changes to Workers Compensation Board membership. We have previously indicated our understanding of how governments feel they must attempt to shift the focus of workers' compensation, usually through making changes at the Board level. Given our recommended changes to the Board structure, it should be possible (if government feels it necessary to do so) to make changes in direction at the top without losing continuity of knowledge and expertise. The expanded Board will allow for change to be made more gradually than has often been done in the past.

And to conclude, we recommend that the government consult closely with the business and labour communities before making appointments to the Board. We do not believe government must accept without question, the names put forward by the constituencies. Ultimately, the government chooses who is to be appointed. However, if industry and labour cooperate in providing alternate names of prospective Board members, i.e. offering government some choices, we are confident that those who have the trust and confidence of the parties will be chosen to serve.

RECOMMENDATIONS

In summary, our recommendations for a modified Board structure are as follows:

146. That the Board of Commissioners be tripartite in nature, with equal representation from business and labour, and an acceptable neutral Chairperson, and that this principle be enshrined in the law.

147. That the Chairperson and one member each from the business community and the labour community be appointed full time.

148. That there be four additional part-time members appointed to the Board—two each from the business and labour communities.

149. That two alternate members be appointed—one from business and one from labour—who are to serve only in the absence of a member from their constituency.

150. That the government closely consult with the respective interest groups, on all appointments to the Board of Commissioners.

151. That the Board of Commissioners define its function as policy development strategic management which would include the evaluation of policy implementation, the handling of appeals and of public relations, and which would leave

the running of the day-to-day operation to the staff of the Board. Inherent in this recommendation is the opinion that Board members should cease their role as overseers of specific departments.

CHAPTER 12

PROPOSALS FOR CHANGE—APPEALS

I. THE APPEAL SYSTEM

There are three levels of appeal within the Manitoba Workers Compensation Board. In all cases where an appeal is received, either from an injured worker or an employer, the appeal is first reviewed by the original adjudicator. We have commented on this practice earlier in this Report. **To briefly restate, we believe that when an appeal is received it should be returned to the original adjudicator, only for a speedy review. The adjudicators should not place a second opinion on the file before it proceeds to the next level of appeal.**

The second level of appeal is a Committee of senior adjudicators. In the case of Claims and Rehabilitation appeals, this body is called the Review Committee; in the case of assessment decisions, it is called the Assessment Committee.

During 1986 the Review Committee made decisions in 540 cases, compared with 556 in 1985, and 501 in 1984. The results of those appeals can be broken down as follows:

	1984		1985		1986	
1. **Worker Appeals** a) successful	80	**(19%)**	69	**(14%)**	83	**(16%)**
b) partially successful	included in a)		included in a)		16	**(3%)**
c) unsuccessful	347	**(81%)**	422	**(86%)**	419	**(81%)**
Sub total	427	(100%)	491	(100%)	518	(100%)
2. **Employer Appeals** a) successful	6	**(20%)**	1	**(3%)**	3	**(11%)**
b) partially successful	included in a)		included in a)		0	
c) unsuccessful	24	**(80%)**	36	**(97%)**	24	**(89%)**
Sub total	30	(100%)	37	(100%)	27	(100%)

There are several factors which could lead to such a low rate of successful appeals. For example, primary adjudication could be virtually faultless. However, in our opinion, the reason is more likely a Review Committee insufficiently independent of the primary adjudication process and unwilling to make tough, positive decisions (possibly due to concern about negative consequences from Departmental management or the Board of Commissioners) But whatever the reason, such a low rate of successful appeals is a concern to us. The generally accepted wisdom is that appeal bodies normally overturn approximately 40 per cent of prior decisions—a number well above the 14-to-19 per cent overturned by Review Committee. **Injured workers, their representatives and employers may well question the utility of a four- to six-month wait for a decision which will be in their favour less than 20 per cent of the time. We have concluded that a second level of appeal (such as the Review Committee) is necessary, but that it must become more independent of the primary adjudication process.**

The third and final level of appeal is to the Board of Commissioners. At any point in this process, the case may be referred to a Medical Review Panel.

RECOMMENDATIONS

152. **When an appeal is received it should be returned to the original adjudicator, only for a speedy review. The adjudicator should not place a second opinion on the file before it proceeds to the next level of appeal.**

153. **The Review Committee should become more independent of the primary adjudication process.**

154. **Workers Compensation Board Medical Officers should have no role in determining whether or not a Medical Review Panel should be convened. In all cases where the injured worker, supported in writing by his/her physician, believes that the Board has erred in denying or terminating benefits, or in determining the level of**

benefits to be paid (in the case of partial disability awards), and the claimant requests a Medical Review Panel, then one shall be convened by the Workers Compensation Board.

II. MEDICAL REVIEW PANELS

Medical Review Panels are established under section 54.1 (1) to (8.4) of *The Workers Compensation Act*. Medical Review Panels are composed of three physicians: one appointed by the employer, one appointed by the injured worker, and a Chairperson named by the Minister. They are established in two circumstances:

> 54.1(3) Where in any claim or application by a workman for compensaton a medical matter arises in which the board desires a further opinion, **the board may refer** the matter to a panel for its opinion in respect of the matter.
>
> 54.1(4) Where in any claim or application by a workman for compensation the opinion of the medical officer of the board in respect of a medical matter differs from the opinion in respect of that matter of the physician selected by the workman, expressed in a certificate of the physician in writing, **if the workman requests the board, in writing, to refer the matter to a panel, the board shall refer** the matter to panel for its opinion in respect of the matter. (emphasis added)

Currently, section 54.1 (3) is not commonly used by the Board of Commissioners. In 1984 the Board referred four cases to Medical Review Panels; in 1985 two cases were referred; and in 1986, 13 cases were referred. Also in 1986, the Board began to refer cases for "further medical investigation." It is our opinion, from reviewing the minutes of the Board of Commissioners, that usually in these cases the "further medical investigation" consists of a referral to the Board's Medical Officers.

The issue of referrals to Medical Review Panels, under section 54.1 (4), was raised at our public hearings. Ten injured workers claimed that they had been denied Medical Review Panels, despite the written opinion of a doctor outside of the Workers Compensation Board supporting their claim. One source of this problem is the process used by the Board to determine the existence of a difference of medical opinion. This decision is made, not by a Claims Officer or Claims Processor, but rather by a Medical Officer who may have written the original opinion which led to the denial or termination of benefits. Another source of this problem seems to be the reluctance of the Board to convene Medical Review Panels. **We do not understand this reluctance on the part of the Workers Compensation Board and we believe that this practice runs counter to the spirit, if not the letter, of Section 54.1(4). In any case where the injured worker and his/her doctor believe that a decision of the Board regarding the claimant's eligibility for benefits or the level of benefits is in error, and where the claimant requests a Medical Review Panel, one should be convened by the Workers Compensation Board. We believe that the current practice of having Medical Officers determine if a difference of medical opinion exists, constitutes an unnecessary barrier which should be removed from the appeal process.**

The members of Medical Review Panels are currently selected, as per sections 54.1 (8.4), from among a list of specialists provided by the Manitoba Medical Association. This is an historic anomaly. **The licensing body for doctors in Manitoba is the Manitoba College of Physicians and Surgeons, and it is this body which should provide a list to the Workers Compensation Board, of specialists in their appropriate fields.**

During public hearings, and as a result of our own experience, we are aware that it is sometimes difficult for injured workers to find doctors to serve on their behalf on Medical Review Panels. In part, we believe that this is due to the current, unhappy relationship between community doctors and the Board. In part, however, we believe it is also a financial issue, i.e. some doctors believe that serving on a Medical Review Panel for $250 for a half-day (the current fee) represents a loss of income to them. **We have, therefore, concluded that an appropriate fee schedule should be negotiated between the Workers Compensation Board and the Manitoba Medical Association, to ensure that there are no financial barriers to injured workers being represented at Medical Review Panels by the doctor of their choice. Once such a fee has been negotiated, the current practice of extra-billing (by some doctors) of some employers should cease.**

In the case of claims for occupational diseases and repetitive trauma injuries, the involvement of those with other professional expertise (such as occupational hygienists, toxicologists, epidemiologists and ergonomists) will result in a more thorough inquiry into the work-relatedness of a particular claim for compensation. ***The Workers Compensation Act* should therefore be amended to allow for the inclusion of other professionals with relevant knowledge, at the discretion of the panel. The *Act* should be amended to allow the Medical Review Panel to seek out, and pay for, necessary non-medical expertise.**

Dissenting Opinion (Farrell)

I agree with the above opinions of my colleagues. However, I also believe that the role of employers in

Medical Review Panels needs expansion. During public hearings, employers expressed concern that while the present workers' compensation legislation allows the worker or the Board access to Medical Review Panels where a difference of medical opinion exists, such access is not granted to the employers.

Employers see this as a denial of a basic right. Employers fund the system in total and believe that they should be afforded the same rights as are permitted in several other Canadian jurisdictions where enabling legislation permits the employer, under certain circumstances, the opportunity of requesting that a Medical Review Panel be established to determine the work-relatedness of an injury or factors resulting in excessive lost time. It is my opinion that in those cases where an employer has received medical advice regarding a specific case that differs from the medical opinion being accepted by the Board in its adjudication, the employer should be able to submit the medical opinion to the Board and request that (based on that difference of opinion) a Medical Review Panel should be convened. While I acknowledge that it is not the intent of legislation to permit every case to go to a Medical Review, I believe the Board should be permitted the discretion of allowing an employer access to Medical Review, where the Board believes such a Review Panel is warranted.

It is, therefore, my opinion that the wording of *The Workers Compensation Act* should be amended to permit, under specific guidelines similar to those related to workers' access, an enabling section permitting employers to request a Medical Review of the specific case and subsequent adjudication based on the findings.

RECOMMENDATIONS

155. **Majority Recommendations [155 through 157: King and Donner]**

The Manitoba College of Physicians and Surgeons should replace the Manitoba Medical Association as the appropriate body to supply the Workers Compensation Board with a list of medical specialists from which the members of Medical Review Panels should be chosen.

156. **An appropriate fee schedule should be negotiated between the Workers Compensation Board and the Manitoba Medical Association, to ensure that there are no financial barriers to injured workers being represented at Medical Review Panels, by the doctor of their choice. Once such a fee has been negotiated, the current practice (by some doctors) of extra-billing some employers should cease.**

157. ***The Workers Compensation Act* should be amended to allow for other professionals with relevant knowledge to be included on Medical Review Panels, at the discretion of the Panel and with the consent of the injured worker.**

158. **Minority Recommendation [Farrell]**

In addition to the above, *The Workers Compensation Act* should be amended to permit employers to call for a Medical Review Panel to be convened, if, as is the case for workers, they have medical support for their position.

III. APPEALS TO THE BOARD OF COMMISSIONERS

One of the more discussed issues at public hearings and in our consultations with employers, trade unions and workers, was the issue of exclusive jurisdiction of the Workers Compensation Board to hear appeals. Employers generally opposed the concept of an external appeal body, basing their opposition on the argument that there is no accountability for decisions in an external body. Therefore, the argument went, precedent-setting decisions could be rendered by an external appeal, which run counter to the policy, philosophy and financial capabilities of the Workers Compensation Board. The opposite argument for an external appeal body (made to us mostly by workers and trade unions) was that the only way to guarantee independent decision-making at the appeal level is through such an external tribunal. Because the Board of Commissioners performs the dual function of financial management and claims adjudication, some argued that an inherent conflict of interest exists in the system. Both industry and labour were very aware of the experience in Ontario (recent though it is) with an external appeal body.

Accompanying the question of whether there should be an external appeal body, was the question of where such a body would fit into the organization, if at all. The Province of British Columbia has, for instance, an external appeal which takes place **before** a hearing or appeal to the Board level. Therefore, that province's Workers Compensation Board retains the right to overturn decisions of the external appeal body, and thereby retains its final jurisdiction. In Ontario, on the other hand, final appeals are external and take place **after** the internal appeal to the Board of Commissioners. Thus, the Compensation Board in Ontario has given up authority, although the debate is still taking place as to how far the Board will go, under its authority as stated in Section 86(n) of that province's Act, which reads as follows:

> **86n. Determination of issues by Board.**
>
> (1) Where a decision of the Appeals Tribunal turns upon an interpretation of the policy and general law of this Act, the board of

> directors of the Board may in its discretion review and determine the issue of interpretation of the policy and general law of this Act and may direct the Appeals Tribunal to reconsider the matter in light of the determination of the board of directors.
>
> (2) Where the board of directors of the Board in the exercise of its discretion under subsection (1) considers that a review is warranted, it shall either hold a hearing and afford the parties likely to be affected by its determination an opportunity to make oral and written submissions or it may dispense with a hearing if it permits the parties likely to be affected by its determination to make written submissions, as the board may direct.
>
> (3) The board of directors of the Board shall give its determination and direction, if any, under this section in writing together with its reasons therefore.
>
> (4) Pending its determination, the board of directors of the Board, with respect to the decision that is the subject-matter of the review, may stay the enforcement or execution of the order made under the decision or may vacate the order if it has been implemented.
>
> (S.O. 1984, c. 58, s. 32)

In the next chapter we outline our recommended restructuring of the Workers Compensation Board, to provide for a more independent organization. We believe that this is one way to safeguard objective and independent appeals, without establishing a totally external appeal. And to add a further degree of independence, we recommend that three Appeals Chairpersons be appointed. These Chairpersons, who would not be voting or acting members of the Board of Commissioners, would be available to chair final appeal hearings in place of the Board's Chairperson.

We spoke of our concern about delays in the appeal process. Given the numerous functions of the Board of Commissioners, and given considerations of holidays and other leaves of absence (business or otherwise), there is limited time for the regular Chairperson to be available for appeals. **The appointment of three Appeals Chairpersons would allow for a more expeditious final appeal, since up to three, final-level appeal hearings could be conducted simultaneously.** We envisage each appeal "panel" meeting once a month, for up to three days, allowing one day for preparation, one day for hearings and one day for decision-making and writing. Such a format would allow (assuming that four appeals were held by each panel at each sitting) for over 130 final appeals to be heard each year. Should this not lead to a significant reduction in the delay faced by appellants, then it would be necessary for the panels to meet more frequently.

Each panel would be composed of an Appeals Chairperson, a labour member of the Board of Commissioners and a management member of the Board of Commissioners. Because we are recommending a full-time and two part-time representatives each, of both labour and management, we believe that this proposal will work well to both speed up the appeal process and to introduce one external voice into the final appeal process.

The Appeals Chairpersons would be part-time and would not have a voting membership on the Board of Commissioners. However, attendance at Board meetings should be welcomed for purposes of observation and education. Individuals chosen for this role should be ones who meet with acceptance from both management and labour, similar to the type of individual who is chosen to chair arbitration boards, and would be appointed by the government after consultation with management and labour.

The creation of these positions of Appeals Chairpersons will serve to deal with the delays in the present appeals structure at the Board level and will provide some external input into decision-making, but will leave the majority decision with the members of the Board of Commissioners. A quorum for a final appeal hearing would be three members—one labour, one management, and an Appeals Chairperson. A decision could be reached by any two votes.

There was much debate among our Committee members, as well as by participants at public hearings, on the question of an external appeal body. Other considerations aside, the major concern we have with an external appeal has to do with the move, in Manitoba and in other provinces, toward an adversarial model of workers' compensation, rather than the inquiry model which has been the basic design since the program's inception.

Under the inquiry model of workers' compensation, it is the duty and responsibility of the Workers Compensation Board to gather sufficient evidence on both sides of any issue to make an intelligent and reasonable decision. The compensation system does not leave to, nor should it rely on, expert witnesses brought forward by either employers or workers, in deciding an issue. Rather, the Workers Compensation Board has the mandate and resources to do a thorough job by itself. This does not preclude either an employer or worker providing information which may have been overlooked or not taken into

account. Nor does it preclude either the employer or the worker presenting arguments as to legal interpretation. What it does preclude is the establishment of an adversarial system where two sides argue a matter before the Board of Commissioners, with the Board taking a primarily non-participatory role. Such is the system developing in Manitoba.

By way of illustration, we are informed that the members of the Board of Commissioners do not review a file before an appeal hearing is held. This practice is carried out with the best of intentions on the part of the Board members. They do not wish to prejudice their thinking in any manner, or appear to have reached any conclusions prior to hearing the evidence presented by the parties. Such procedure is normal in the adversarial system. However, there are two problems with such methodology. First, and more importantly, not having reviewed the case, the Board is often unable to ask the appropriate questions which would lead to a proper and just decision. Individuals presenting an appeal before the Board of Commissioners (even those who are represented by an advocate of some sort) are often unaware of workers' compensation theory and law. And because an apparently complex claim may hinge entirely on one issue, if the presentors fail to deal with the particular issue, and if the Board members have no prior knowledge of the case and, therefore, have not identified the issue, an appeal may be made without the most important item ever being dealt with.

We are aware that there are some who favour the Board's present practice. But on balance, and having considered the matter carefully, we must opt for the more informal approach of the inquiry model. Not all workers and employers who appear before the Board of Commissioners on appeal are able to comprehend what should, indeed, what must, be brought forward in order to make their point. The Board, through its inquiries, must assist such individuals to make their best case. **It is not the function of the Board to hear two arguments and determine which is more compelling. Rather, it is the function of the Board to bring out all information which is relevant to a case and make a decision based upon fact and law.**

A second major problem with the Board of Commissioners' appeal process, resulting partly from the Board's practice of not reviewing files prior to a hearing, and partly from the Board's initiative in inviting employers to attend hearings, is that many appeal hearings have become an open debate between employer and worker as to the credibility of either party. In order to "win" their case, both sides may resort to accusations which, under different circumstances, would never be made. The effect of such a practice on the relationship between employers and workers of any organization must be negative.

We spent considerable time in public hearings, discussing this problem with employers. It was admitted by numerous parties that the adversary role was not conducive to good, employee relations. It was further admitted by other employers that they attended Board of Commissioners' hearings at the invitation of the Workers Compensation Board, and often had no argument to make against a claim. Indeed, some employers who attend appeal hearings argue on behalf of an employee's claim rather than against it.

We do not disagree with participation by employers (as more than a source of funding) in workers' compensation. There is an argument that employers, by paying their assessments to the Workers Compensation Board, relinquish all interests to an insuring party which will make all decisions on a claim. But in fact, employers are an important, indeed, vital part of any inquiry model. The vast majority of claims are easily and efficiently adjudicated, but only through employer-worker cooperation, with both parties submitting the forms which lead to the claim being processed. If there is any trend toward invalid claims being filed, the compensation system, because of its nature and design as a facilitator, relies on employers to be the ones to question invalid claims. **But employers are not required (nor should they be) to do the work of the Workers Compensation Board in determining the legitimacy of a claim.** If an employer suspects that a claim is not legitimate, and provides sufficient grounds for an invalid claim (as opposed to merely questioning a claim for frivolous reasons), the compensation system does initiate investigations. Under a well-run inquiry system, such informal handling of claims works very well, as there is a control factor against questionable claims; but valid claims are allowed to move through the system smoothly.

We are not suggesting that employers have no part to play in the appeal process. Some employers argued vociferously that they have the right to appear at appeal meetings, the right to see all pertinent information on file and (especially since the creation of the Office of the Worker Advisor) the right to counter any arguments made on a worker's behalf.

With all due respect to these views, we believe that they reflect more upon the mistrust employers have, that the Board will not fairly adjudicate claims unless employers are physically present to present their point of view. Surely, however, employers would have more productive things to do than to argue against compensation claims if they had faith that a fair and impartial compensation system would search out the facts on a claim and render an equitable decision. **If there is material or arguments which the**

employer feels will be overlooked, we would far rather see the Board of Commissioners hold a separate meeting with the employer, than to have the employer sitting across the table from the worker, presenting arguments. There may be rare disputes of fact, which in the Board's opinion, require having both the worker and the employer jointly present. However, these meetings should be fact-finding rather than adjudicative.

The delicate question of the need to cross-examine evidence is often raised as an issue, when discussing the inquiry model versus the adversarial model of adjudication. For instance, the employer may claim, in submitting an appeal, that a worker is a "chronic complainer" or that a worker has "alcoholic tendencies." On the other hand, a worker may submit that his/her employer consistently supresses claims or "bullies" workers into not reporting incidents at work. Many in the advocacy role consider it vitally important to rebut such allegations. However, the tripartite format of appeals (with representation from both management and labour) assumes that such issues are dealt with in separate meetings—one with the worker and one with the employer.

Furthermore, files remain open to the participants to the extent presently allowed by law. If the Board of Commissioners has not sufficiently dealt with adverse testimony, or has not offered the right of rebuttal to the parties, further representation is possible by either side.

In summary, our recommendations regarding the role of the Board of Commissioners in appeals are as follows:

RECOMMENDATIONS

159. That three part-time Appeal Chairpersons, acceptable to both labour and management, be appointed by government, to assist in the appeal function of the Board of Commissioners.

160. That such individuals not be voting members of the Board of Commissioners, but be invited to attend policy and planning meetings of the Board.

161. All final appeals should be heard by a three-member panel composed of an Appeals Chairperson, one labour member of the Board of Commissioners (either full- or part-time) and one management member of the Board of Commissioners (either full- or part-time).

162. That a quorum for appeals at the Board of Commissioners' level be a tripartite panel of three members.

163. That Board hearings be non-adversarial in nature, the Board of Commissioners having previously reviewed the file under question. The panel should be free to question participants to the extent necessary to elicit the pertinent facts.

IV. APPEALS DIRECTOR

Workers' compensation involves both an administrative function and an adjudicative function. The day-to-day operation and management of workers' compensation is in the hands of an Executive Director. This position oversees the line Departments of the Board, including the Claims Department, the Rehabilitation Department and the Assessment Department. It is in these three Departments that appeals of decisions occur.

Some Boards have provided for a Director of Appeals—a position which has equal status to that of the Executive Director in the organization. There are several reasons for doing this. To begin with, such an appointment adds prestige and authority to the appeal process, placing equal emphasis on the adjudicative side of workers' compensation as is placed on the administrative side. Secondly, by separating the appeal function, there is a removal of the appeal process from the department which made the original decision. For instance, an employer may appeal a decision of the Assessment Department on some question related to his/her firm's positioning in the rate-code schedule. Although the final appeal is to the Board of Commissioners, the intermediate step is for an Assessment Committee to review the decision. It is sometimes pointed out that internal appeals of this sort are less effective than an appeal to a body which has separate authority and positioning in the organization.

We recommend that consideration be given to placing appeals under the authority of a Director of Appeals, who would have equal status with the Executive Director.

RECOMMENDATION

164. That all intermediary and final appeals be the administrative responsibility of a Director of Appeals. The Director of Appeals would have equivalent status to the Executive Director.

V. WORKER ADVISORS AND THE OMBUDSMAN

During public hearings we had some requests to comment on the role of the Worker Advisor and that of the Ombudsman, in workers' compensation appeals. The Ombudsman is appointed to serve as a watchdog for the citizens of Manitoba, over the numerous government agencies and departments. The major authority of the Ombudsman's Office, other than the right to investigate and see files and records relevant to a complaint, is one of persuasion. Whether this persuasion comes by way of recommendation to the government about a complaint, or through the ultimate persuasion (of going to the public), the Ombudsman cannot overrule Workers Compensation Board decisions. And we agree that the Ombudsman should not have such power.

Continuing on this topic, we believe (having had discussions with both the Board of Commissioners and representatives of the Ombudsman's Office) that the Board should be more sensitive to the requests, opinions and recommendations of the Ombudsman, on workers' compensation claims. We are not suggesting that the Board abrogate its right and authority in making all final decisions; we are suggesting that in the very few cases which reach the stage of recommendation by the Ombudsman's Office, the Board **very** carefully weigh the merits of its own decision against the recommendation of the Ombudsman.

Worker Advisors fulfill a different function than that of the Ombudsman. They perform an advocacy role on behalf of injured workers. While it is sometimes suggested that this tips the balance in favour of workers (and enters an adversarial element into what we have tried to describe as an inquiry system), some employers counter this suggestion with the request that an Employer Advisor Office be established to even the balance.

If there is any adversarial element in workers' compensation, it surely lies between the worker and the Board, however, and not between the worker and the employer. To set up an Employer Advisor Office would be to make a recommendation in favour of adversarial workers' compensation—something we reject. If employers have legitimate concerns about an individual claim or assessment problem, we would hope that the compensation system itself would be eager and willing to provide assistance through its inquiry function. But how do we counter the argument that the worker should be able to rely on the Board to do the same?

Part of the answer is historical. The Worker Advisor Office was instituted at a time when the level of aggravation and grievance among injured workers was high. Perhaps the Board at the time was not fulfilling its inquiry role to the extent necessary; perhaps the administration of benefits was much more rigid than today; and perhaps injured workers had developed a distrust of workers' compensation, which could not be overcome by administrative and program changes. In any event, the Office of Worker Advisor was instituted and has now become recognized as an integral part of the workers' compensation system.

If there is a mutual trust and understanding between the Board and the Advisors, the role of the Advisor fits into an inquiry model. Advisors, by preparing a solid presentation of the facts and legal argument, can help the Board in determining claims which are complex and difficult to adjudicate. In order for this to work, the Board must respect the Advisors, and vice versa.

Another rationale for the Advisor's Office lies in the sheer number of complaints and requests for service. There are approximately 20,000 employers covered by compensation in Manitoba, and the main area of concern for most of them is the level of assessment. This type of complaint is one which can be handled between the Board and the individual employer. Yet, in the more than 50,000 work injuries which occur in a year, the complaint of most injured workers relate to their individual claim. Part of the solution to the handling of this volume of individual complaints rests with the Worker Advisors.

We have the concern, then, that the Worker Advisor Office remain in the perspective of an inquiry model. And we have an additional concern regarding the rights and powers of the Advisor to investigate claims. We do not believe that Advisors can adequately perform their duties without access to all files and records pertaining to a Board decision, so we therefore recommend that *The Workers Compensation Act* be amended to accomplish this.

RECOMMENDATIONS

165. That the Board of Commissioners give careful consideration to recommendations received from the Ombudsman's Office, weighing the merits of its own decisions against the recommendations received.

166. That *The Workers Compensation Act* be amended to give Worker Advisors the power to review all relevant workers' compensation files and records, including policy documents which may have led to or influenced the decision.

167. That the Workers Compensation Board should view the Worker Advisors, not as potential adversaries, but as an aid to the inquiry process.

CHAPTER 13

ADMINISTRATIVE REORGANIZATION

THE CLIENT SERVICES DEPARTMENT

We have previously addressed our concerns regarding the policies, procedures and practices of the Claims and Vocational Rehabilitation Services Departments, which, in our opinion, result in inadequate service provision. We have also indicated in brief, our strong belief that quality of service is also adversely affected by the current structuring of these departments, as well as by the problems in communication between them. These historical difficulties are related to a number of issues, some of which have previously been discussed. Others include the wide salary differential between Claims Officers and Vocational Rehabilitation Counsellors, and the lack of established "career ladders" to allow Claims Officers to advance into the higher-paying counsellor positions. However, some of the results of these problems are: an absence of early rehabilitation intervention, the revolving door syndrome previously described and the limited ability of rehabilitation staff to deliver vocational rehabilitation due to administrative demands related to paper flow and benefit payments.

The revolving door syndrome mentioned above results from the current division of responsibilities between the Claims and Vocational Rehabilitation Services Departments. Under this system, the Claims Department is responsible for payment of benefits when an injured worker is considered to be totally disabled from all employment. The Vocational Rehabilitation Services Department takes over responsibility for benefits, as well as for provision of vocational rehabilitation services, when the injured worker has restrictions placed on physical activity but is considered fit for employment appropriate to those restrictions.

The problem is that the injured worker's injury or condition may be such that s/he may be considered fit for suitable duties and then disabled, and then fit again, and so on, with the resultant transfer of responsibility between the two departments. Often the results of this awkward and cumbersome system have been the lack of rehabilitation services for disabled workers and/or interruptions and irregularities in the payment of benefits. Moreover, early vocational rehabilitation involvement becomes difficult to impossible.

As we have noted, we feel that in order to provide adequate service, the Claims and Vocational Rehabilitation Services Departments should not operate independently but should be combined into what we have called a Client Services Department. We envision the department as operating on a team model of case management in order to facilitate the timing of appropriate interventions as well as efficiency of benefit payment.

We propose a model which operates on an alphabet-split basis with a case-management team, including a claims adjudicator, vocational rehabilitation counsellor, possibly a nurse and the necessary support staff. The team would be responsible for all payments and services to injured workers whose cases fall within their alphabetical range. Other specialist staff, such as Re-employment Officers, could be assigned on a similar basis or could be utilized as "floaters" to allow access by the various case-management teams to the specific market expertise of individual Re-employment Officers, and to allow for such industry-specific knowledge to be developed.

One of the problems identified within the current structure is that the responsibility of Vocational Rehabilitation Counsellors for ensuring ongoing benefit payments, cuts into the time available for vocational rehabilitation planning. Under the proposed system, responsibility for payment would remain with the primary adjudicator—the Claims Officer. As in the case of private insurance firms, vocational rehabilitation staff would act as specialist-consultants responsible for providing rehabilitation services as prescribed under legislation and policy. We anticipate that this specification of duties for rehabilitation staff, and the removal of responsibility for payments, would facilitate early intervention in cases in which long-term planning and/or counselling appear to be indicated. We also anticipate that such a restructuring would eliminate the current situation of referrals for rehabilitation after many months (or even years) of temporary total disability—situations in which good vocational rehabilitation is, in many cases, impossible.

We do not have sufficient expertise or information to provide a fully detailed blueprint for immediate implementation of a Client Services Department. However, we can state that considerable professional literature exists in support of a team approach to rehabilitation of illness and injury, and that some private insurance firms appear to operate effectively with a similar structure. The Workers Compensation Board should begin research into such a service model as soon as possible, in order to implement the necessary changes and facilitate the amalgamation of the two departments as smoothly as possible and with the least amount of disruption to staff and claimants.

For this model to be effective and efficient, some other factors must be in place, including:

1) an improved computerized payment system, as the current system is cumbersome, slow and overly dependent on data being entered in hard-copy files. The current computer system is inadequate both in terms of its data base (as has already been discussed) and its ability to produce benefit cheques regularly without a lot of manual work by staff. However, we feel that this is not an inadequacy of the computer

hardware, the software or the Data Processing Department staff. It reflects, rather, a lack of adequate planning and organization. We are confident that the Data Processing Department can create an adequate on-line system and a simplified cheque-processing system. However, this will not happen until the Workers Compensation Board places a priority on the establishment of data relevant to long-term financial and program planning, and on a cheque-processing system which ensures regular and accurate payment with a minimum of red tape.

2) a more cooperative relationship between claims adjudicators and vocational rehabilitation staff.

3) clear guidelines re benefits and services available to injured workers.

4) legislative amendment (as noted earlier in this Report) to provide an entitlement to vocational rehabilitation for those workers, disabled as the result of a compensable injury, who are unable to return to their pre-accident employment.

We would expect that in a system in which claims adjudicators and vocational rehabilitation staff share the responsibility of case management, a more collegial relationship will develop. It is more difficult to resent an individual than an abstraction such as a department or a job description. However, we believe that difficulties will remain until such issues as salary differentials and career ladders are addressed. The model we have proposed depends on cooperation and communication. Anything which threatens these necessary elements is a significant problem which should be addressed.

A major general thrust of this Report has been that the Workers Compensation Board must move toward a clarification of what benefits and services are available to injured workers, and under what circumstances. Such clarification should help allay the uncertainties of injured workers, as well as providing Board staff with the confidence which comes from a clear understanding of what their responsibilities are. Vocational Rehabilitation Counsellors would be able to negotiate in good faith with injured workers around vocational rehabilitation planning.

This recommended restructuring is best understood within the context of our overall discussion of the problems we perceive within the current system, the philosophy of workers' compensation and the specific recommendations for change—in both legislation as well as in policy, procedure and practice. It is meant to allow for a structure to develop which is able to be more efficient in adjudication and payment of benefits, as well as effective in delivering essential services to injured workers. We do not expect that the necessary changes can be carried out overnight, or that they will eliminate all problems of communication and administration. However, we do expect that such changes, made out of a commitment to a truly cooperative team approach to case management, will eventually improve service from the points of view of both injured workers and staff. Again, however, it cannot be over-emphasized that the proposed amalgamation is meaningful only within that context which includes the other concerns we have raised and problems we have identified.

RECOMMENDATIONS

168. That the Claims and Vocational Rehabilitation Services Departments be reorganized into a new, combined Client Services Department.

169. That the Client Services Department should operate on a team model and that each team should be composed of a claims adjudicator, a vocational rehabilitation counsellor, and necessary support staff.

170. That in order to provide well coordinated services to injured workers, each team would be responsible for all payments and services to those injured workers in its caseload.

171. Specialized staff such as Re-employment Officers may be assigned to one or more teams.

172. That in order to operate successfully, our model presupposes the existence of:

- **a) an improved computerized payment system,**
- **b) a more cooperative relationship between claims adjudicators and vocational rehabilitation staff,**
- **c) clear guidelines for injured workers as to benefits and services available,**
- **d) legislative change, as noted in Chapter 7, to provide an entitlement to vocational rehabilitation for those workers, disabled as the result of a compensable injury, who are unable to return to their pre-accident employment.**

CHAPTER 14

CONCLUSION

We have completed our review of the workers' compensation system in Manitoba, and trust that our Report will provide stimulus to the debate presently taking place in the province on the subject. Given a report of this length, and given the number of different and contentious areas we have covered, we are proud to note that there are very few areas where consensus could not be reached. While each member of the Committee may not feel as strongly about every recommendation made, we are unanimous in our belief that the consensus and compromise we achieved are necessary for a healthy compensation system.

The themes you will have found in this Report—the need for openness on the part of the Compensation Board, the need to move from an adversarial model of compensation to an inquiry model, the need to provide the right of self-determination to injured workers—are essential ingredients to the renewal of faith in the system by employers, workers and the public. We believe that government and Opposition are committed to an improved compensation system. We believe that employers and workers share this commitment, as does the Workers Compensation Board. We also believe that this Report provides the groundwork for the improvements required.

Let us repeat our opening remarks now that the reader has completed reading the Report: our criticisms of the law and policy of workers' compensation in Manitoba are meant to be constructive. We understand the difficulties of the Board of Commissioners in administering such a complex program. We respect the staff at the Workers Compensation Board. Our recommendations are intended to improve or further the work that has already been done.

Future Reviews

We have completed our review of the workers' compensation system in Manitoba. Our Report does not cover everything that others wished us to cover; indeed, it does not go as far as we would have liked in commenting on the law, the policies and the procedures of workers' compensation in the province. Part of the blame for that rests with the fact that no review has taken place since that done by Justice Turgeon in 1958. Over the course of some thirty years, aggravations were allowed to build up. Injured workers and employers felt the frustration of having no regular forum in which to express their views. Therefore, the sheer volume of material and issues presented to us seemed overwhelming at times. We did the best we could under the circumstances.

We do not believe that such a situation should be allowed to develop again. Change is occurring too rapidly in our society for the compensation system to remain static for more than a very few years without modification. Therefore, we believe in the need for a regularized statutory review of the compensation system and we will so recommend.

Before moving on to the specific recommendations, let us share some of the things which we learned in this review. Firstly, the testimony of injured workers, employers, and others at a series of public hearings will follow each of us for a good many years. There is a value in allowing people affected by a system to have a direct impact on the future of the system, and we certainly heard from those affected. Each of us will remember specific cases; not each of us will have the same recall of the same case, but the public hearing process is absolutely vital to an effective gathering of ideas.

Secondly, the need for research in the field of workers' compensation is absolutely vital to a successful review. Elsewhere in this Report, we recommended that a Research and Policy Planning Branch be set up at the Workers Compensation Board in order to begin developing the information needed to evaluate the program. But a committee such as this requires additional research.

It would be quite helpful if a department of government did some monitoring of the workers' compensation program on an ongoing basis. This would allow for secondment of staff to work for future committees such as this.

The triparitite nature of the Committee was particularly valuable in bringing differing and varied views to the subject in question. We would strongly urge that the tripartite model be retained, since employers and workers are the ones directly affected by the compensation plan.

We therefore make the following recommendations for future reviews of workers' compensation:

RECOMMENDATIONS

173. That *The Workers Compensation Act* be amended to require a review of the workers' compensation system every four to five years.

174. That the *Act* require a balanced committee of employers and organized workers to be appointed for such a review, under the auspices of a neutral chairperson.

175. That sufficient resource staff be made available to such a committee in order to allow it to do a thorough job of analysis.

176. That such future committees be given powers of subpoena in order to review all matters pertaining to the compensation system.

Auditing the Review

One of the tests of any such review of a complex issue such as workers' compensation lies in the ultimate acceptability or rejection of the various ideas which have been put forward or recommended. In our case, we have given directions to both government and the Workers Compensation Board for reform and change to the system. We feel that some sort of audit should occur as to which recommendations are accepted and which are rejected, with reasons being given in the latter instance.

Government could be responsible through the tabling of a Report to the Legislature at the time the Annual Report of the Workers Compensation Board is tabled. The Report could contain a list of the recommendations made which are pertinent to government (e.g. amendments to the law, appointments, consultation, etc.) and provide a timetable and listing of those which have been implemented, those which are to be implemented, and those which have been rejected.

Similarly, the Workers Compensation Board, either through inclusion of a special section in the Annual Report or through a separate Report, could do the same sort of listing of recommendations, with the appropriate timetable and acceptance/rejection status noted.

We believe that such methodology will assure that serious consideration is given to the issues raised in this Report, issues which have been brought to us by both workers and employers. If either the Board or the government disagrees with our conclusions and does not wish to follow our recommendations, they should be prepared to clearly state this and provide reasons.

If, then, the review process becomes a statutory provision and it is done on a regular basis, the recommendations of the future committees can be carefully monitored for implementation and impact, just as we hope our recommendations will be.

Therefore, we recommend as follows:

RECOMMENDATIONS

177. That the government table in the Legislature within one year of receiving this Report, a progress report on the actual implementation, or proposed implementation, of those recommendations which are within the government's jurisdiction.

178. That the Workers Compensation Board publish a similar progress report in its Annual Report.

The Future

The question of whether workers' compensation is able to handle all the problems of worker injury and disease was raised in our public hearings. Some felt that we should be working toward a universal sickness and accident insurance plan which would ultimately replace workers' compensation. Our Terms of Reference were limited to reviewing the law, policies and procedures of workers' compensation, however, and we felt the question of a universal plan of sickness and accident insurance was beyond our mandate. We do wish to state that we are of the belief that movement towards such an eventual universal plan would be in the best interest of all parties.

In any universal scheme, a portion of the costs would be borne by employers, a portion by workers, and a portion by taxpayers as a whole. If such a plan were to be considered, intense debate would take place as to the breakdown in sharing of these costs, with the question of employer responsibility perhaps forming the centerpiece of the debate. Once the decision has been made, however, many of the difficulties we have addressed with the compensation system would be resolved. The entire matter of whether an injury or illness "arose out of and in the course of employment" would be eliminated. Similarly, a universal plan would not have to try to separate out portions of disablement caused by occupational and non-occupational factors, i.e. the question of pre-existing conditions.

We do not feel that we have the mandate to recommend that Manitoba move towards a universal sickness and accident insurance plan. We do believe, however, that further study in this area will prove to be rewarding to all involved: workers, employers and government. We urge a commitment to the future by suggesting a separate study of this issue.

APPENDIX A

BACKGROUND PAPER WORKERS COMPENSATION

1. Introduction

Last year, over one million Canadian workers were injured on the job and applied for workers compensation. In order to pay for these injuries, Boards from across Canada collected over $3.5 billion from employers.

The Province of Manitoba shares in this burden, with 48,685 claims filed by workers and $65 million assessed from employers in 1984. Given the large number of injuries and the amount of money involved, it is not surprising that disagreements exist about the workers compensation programme; some feeling that employers are not receiving proper value for the money collected, and some feeling that workers are poorly compensated by the system.

2. History

Workers compensation is a relatively recent program. Prior to its establishment, workers injured on the job had to rely on personal savings, the charity of family, friends and society, or a lawsuit against their employer in order to survive the financial trauma of being out of work. Legal actions against employers were fraught with problems; the difficulty of proving negligence, the uncertainty of success, the lengthy delays in proceedings, the cost of the action. All of these things argued for a different approach. Employers faced similar problems. There was the competitive disadvantage to an employer who properly insured against liability for work injuries versus the employer who did not insure, the notoriety and attendant bad publicity of a lawsuit, the loss of morale among staff, the financial risk of a large court award. The reform to this mutually unacceptable situation came by way of workers compensation legislation.

3. Principles

There were five basic cornerstones to the original workers compensation laws, cornerstones which have survived to a greater or lesser extent, as follows:

(a) No Fault Coverage. Workers gave up all rights of action against their employer in return for automatic benefits if injured on the job, irrespective of fault on the part of either the worker or the employer.

(b) Collective Liability. In return for freedom against a lawsuit by a worker injured on the job, employers became collectively liable to pay for the costs of the programme.

(c) Guaranteed Benefits. Workers were guaranteed payment of benefits at a legislated level, irrespective of bankruptcy of individual employers or insurers.

(d) Independent Administration. The designers of workers compensation envisaged an independent administrative body to operate the program, free from potential lobby by workers, employers or government.

(e) Exclusive Jurisdiction. The quasi-judicial boards were given final authority to determine all matters pertaining to the law, with no review by the courts.

4. Benefits

Workers compensation provides financial, medical and rehabilitation benefits to those injured on the job.

In Manitoba, financial benefits are paid to those temporarily disabled by injury at the level of 75% of gross income, up to an insured ceiling ($29,000.00 per annum in 1985).

For those suffering a permanent disability from a work injury, a pension is established, based upon the earnings of the worker and the medical rating of disability. Certain supplementary benefits may enhance the pension.

All of the medical costs of a work injury are the responsibility of workers compensation. These include medical treatment, hospital care, travel costs, the cost of artificial appliances, physical rehabilitation, and nursing home care.

In addition to compensation payments and medical care, workers compensation provides a discretionary vocational rehabilitation service. This may include retraining assistance, educational upgrading, job search assistance, and counselling for injured workers.

Benefits are payable to surviving dependant spouses and children of workers fatally injured from their work.

5. Areas for Discussion

Major changes have occurred in Canadian workers compensation over the past few years. The following items, put forward for discussion purposes, reflect the nature of that change as the evolution of workers compensation continues:

(a) Maximum Earnings Covered. Manitoba insures workers under a formula which automatically escalates from year to year. The formula resulted in a coverage for workers of up to $29,000.00 per annum in 1985. Several provinces have made significant increases to this ceiling in recent years, increases which go hand in hand with the change to compensating workers based on 90% of net income rather than 75% of gross income. For instance, Saskatchewan now has a ceiling of $48,000.00 per annum, Newfoundland $45,500.00 and Alberta $40,000.00. Is the present ceiling level and escalating formula providing sufficient compensation protection for Manitoba workers?

(b) Net Versus Gross. The universal deductions from a worker's normal pay, income tax, unemployment insurance premiums and Canada Pension Plan premiums, result in a net income much lower than gross.

Income tax law allows deductions for dependant spouses and children, resulting in single workers paying more tax than those workers with dependants. When you put these facts together with an increasing compensation coverage, it can be seen that basing compensation benefits on 75% of gross earnings, administratively easy though it may be, results in inequities and inequalities among workers. The worker with a single tax status may take home more in workers compensation benefits than in regular salary. The worker with several dependants may take home less compensation than normal pay.

The province of Alberta, Saskatchewan, Ontario, Quebec, New Brunswick and Newfoundland have all adopted income replacement based on 90% of net income, rather than 75% of gross. Should the Province of Manitoba adopt a different method than 75% of gross income as the basis for compensation benefits?

(c) Canada Pension Plan. Canada Pension Plan is a disability and retirement pension programme which is administered by the Government of Canada. Joint contributions are made by both the employers and workers in order to fund the Canada Pension Plan, however, contributions from both sources cease when a worker is injured and receives compensation. Workers who become disabled and who meet the qualifications of the Plan, are entitled to a disability pension, a pension which is paid in addition to any other benefits, including workers compensation.

Six provinces have begun offsetting the Canada Pension Plan disability pension from workers compensation benefits, arguing that workers should not receive payments, which in aggregate, exceed pre-injury earnings.

In Manitoba, Canada Pension Plan disability benefits are deducted from rehabilitation and special additional compensation benefits. The question arises as to whether Manitoba should offset Canada Pension at all, should offset it more fully, and whether provision should be made for continuing contributions to the Plan while a worker is in receipt of compensation benefits.

(d) Pensions Versus Wage Loss. Partial disability is recognized by workers compensation in Canada in one of three ways:

i) Medically rated pension—a worker is assessed medically, a percentage rating of disability determined, and a pension established which represents this degree of disability. This method of rating partial disability has the advantages of being uniform in application for all workers, of being administratively easy to operate and of providing a worker with a known quantity of income over time. It has the disadvantages of paying different level pensions for precisely the same disability (because it is based upon the income of the worker), of not providing enough income replacement for those who find it difficult to return to work with their injury, and of providing more than income replacement for those who are able to return to pre-injury earnings following maximum recovery.

ii) Wage Loss and Lump Sum—under the wage loss method, a lump sum is payable to a worker based upon the degree of partial disability. Each worker with the same disability receives the same lump sum. As a separate measurement, the earnings loss of a worker is calculated, and actual income replacement is provided on an individual basis. This wage loss is reviewed periodically and increased or decreased according to the individual's circumstances. The wage loss method has the advantages of paying all disabilities the same amount, of compensating actual loss, and of providing regular inflation protection. It has the disadvantages of being more difficult to administer, providing more discretion to the Board, and leaving some uncertainty as to continuity of payment in the mind of the worker.

iii) Wage Loss Pension—the third method of compensating partial disability is a combination of the first two methods. It works by first establishing a pension for a worker based upon the medical rating of disability method, then supplementing the *pension* to account for wage loss.

This method has the advantages of treating workers according to their individual needs, of providing continuity of payment, and in promoting rehabilitation. It has the disadvantages of being unable to adapt to the changing circumstances of the worker, is moderately difficult to administer, and may result in greater expenditures.

The wage loss pension method is one presently employed in Manitoba to compensate partial disabilities, although done so at the discretion of the Board. Should the Province of Manitoba review the method of compensating for partial disabilities?

(e) Dependant Benefits. The nature of payments to dependants varies considerably in Canada, consisting of flat rate benefits in some provinces and income replacement benefits in other provinces.

One trend emerging is that of increasing the payment to dependant spouses considerably, paying the benefit for a shorter period of time, and providing the assistance of vocational rehabilitation in order to assist the spouse to enter or re-enter the workforce. In other words, the trend appears to be away from low-level long-term responsibility towards survivors, in favour of higher benefits when the need is greatest.

Of concern to many people is the fact that a surviving spouse's pension ceases on remarriage, replaced by a lump sum payment. There are criticisms that the lump sum payment is too small, limiting the remarriage option, and that stopping the pension on remarriage is discrimination based on marital status.

What is the proper responsibility of workers compensation towards surviving dependant spouses of fatally injured workers?

(f) Vocational Rehabilitation. Vocational rehabilitation is usally concerned with providing a worker with new skills which will assist in the overcoming of a handicap. Although Workers Compensation Boards have had such programmes available to injured workers for many years, it is fairly recently that emphasis has been placed upon vocational rehabilitation as an equal partner to monetary compensation in assisting workers. The Province of Quebec went so far as to guarantee in law certain *rights* to injured workers in the area of rehabilitation, including the right to follow a vocational rehabilitation plan and the right to return to the preinjury job. Such guarantees as these are totally new in Canadian workers compensation and will be viewed with interest by all other provinces. Should the Province of Manitoba place more emphasis in the area of vocational rehabilitation?

(g) Appeals. The Workers Compensation Board of Commissioners has the final appeal authority on all matters under the Manitoba Act. This means that workers and employers must deal with the Board on all grievances, rather than appealing through the courts or to an external appeal body. There has been a good deal of criticism in recent years about this exclusive jurisdiction of the Board to hear appeals.

One of the major criticisms is that the Board is responsible for setting the policies and procedures of the programme's revenue. If a worker or employer disagrees with a certain policy, the appeal available to them is to be the body which originally set the policy.

Several provinces, British Columbia, Quebec and Ontario among them, have structured separate appeal bodies which are free to decide upon worker and employer grievances independently. Should the Province of Manitoba consider the establishment of a new appeal procedure?

6. Other Concerns

Beside the major topics which were addressed previously, there are numerous other issues affecting workers compensation which cause concern to employers or workers, or both. To list all such concerns is not the desire of this discussion, however, several of these issues will be outlined briefly for informational purposes. Input on these issues would be appreciated.

(a) Previously Existing Conditions. Many workers bring with them to a work injury a previously existing condition which, when combined with a work injury, leads to significant delay in recovery, a significantly greater long-term disability than normal, or a significant delay in undertaking treatment. Some employers argue that they should not be financially responsible for these previously existing conditions. Workers argue that they were able to be actively employed with their conditions until injured, and that workers compensation should be absolutely liable.

b) Access to Information. Until a few years ago, Workers Compensation Boards made all decisions in secret and all material related to their decisions was kept secret. With the implementation of checks and balances on government and quasi-government agencies through the creation of Ombudsman and Worker Advisors, this veil of secrecy began to be lifted. Many Canadian compensation jurisdictions now open their files to both workers and employers. Most Boards still retain the right to be selective about the release of information if they feel it has no bearing on the issue in debate, or has potential to cause harm to the individual in question.

(c) Scope of Coverage. The trend in workers compensation in Canada is to provide coverage to as many workers as possible. Some provinces list the exclusions to coverage by workers compensation rather than the list of those covered, in order to emphasize this point. Manitoba still has large numbers of workers outside of compensation coverage. Should workers compensation coverage be made more universal?

(d) Collective Versus Individual Liability. Most employers are assessed a premium for the costs of workers compensation related to the industry they represent. Thus, high risk industry pays a higher premium than industry which is relatively safer. Some employers who are large enough and who face no immediate closure of their operation, self-insure the entire cost of work injuries to their employees. Both situations, differentials in premiums and self-insurance, represent some weakening of the collective liability principle which is all employers being liable for the costs of all work injuries. Additionally, systems of rewards and penalties to employers, through merit rebate plans, experience rating, and premium penalties add to the weakening of the collective liability principle.

(e) Miscellaneous Concerns. Other concerns are raised from time to time by the individuals and lobby groups interested in workers compensation.

—Some criticize the Workers Compensation Board of Manitoba for relying too much on the advice and opinions of its own doctors and not enough on external examiners.

—Some want to see a form of "preventive rehabilitation." This would involve either the removal of a worker after a certain level of exposure to hazardous substances in the workplace, or the removal of a worker from a type of work which led to a work injury, and provision for financial assistance in rehabilitation.

—Some call for regular legislated cost of living adjustments for all forms of compensation.

—Some call for a far closer relationship between workers compensation and Workplace Safety and Health.

—Some criticize the lack of ability on the part of the employer to question the Board's handling of an individual worker's claim, and the lack of access to certain medical information pertaining to a worker's claim.

(f) Beyond Workers Compensation. By the very nature of its mandate, workers compensation is difficult to administer. The role of the programme is to compensate workers for the effects of work injuries. One of the major difficulties is in knowing whether certain conditions affecting workers arose from their employment.

Some argue, for instance, that certain stress-related diseass are as much a function of a worker's lifestyle as they are of any occupational exposure to risk. Others argue that almost all personal health problems have some linkage back to the workplace.

New products are being introduced in industry on a constant basis, products which *may* be harmful to workers exposed to them. Only time and research will lead to that being known with any degree of certainty.

Some have suggested that we continue to do the best we can in accepting claims which seem valid, denying claims which seem invalid, and that rough justice will prevail in the end. Some argue that the Board should have a stronger onus placed upon them to prove that a condition did not arise from employment before rejecting a claim for compensation. Other voices are being heard which say that we should rethink our basic ideas about workers compensation, and abolish the existing programme in favour of a universal plan which will compensate all injury and disease, regardless of cause. This debate will continue, those favouring the unique nature of workers compensation wishing its retention, and those wanting to see broader protection calling for major reform.

7. Conclusion.

Nowhere near all of the concerns about workers compensation have been addressed in this discussion. There will be almost as many concerns about the system as there are individuals affected by the system.

This Discussion Paper does,however, provide a starting point for those wishing to take part in the review of this major subject. If it assists in stimulating thinking, debate, and a coming forward with ideas, it will have served its purpose.

APPENDIX B

WORKERS' COMPENSATION: PUBLIC HEARINGS

Tuesday, April 1, 1986

THOMPSON

Labour

United SteelWorkers of America (Local 6166)
— Blake McGrath, Local President
— Jose Santos, Injured Worker

Thompson & District Labour Council
— Beverly Cleveland
— Jasper Robinson

Manitoba Federation of Labour
— Wilf Hudson, President
— Harry Mesman, Chairman, MFL Compensation Committee

Employer

INCO
— Wilf Lederhaus

Workers

Mark Banville

David Dick

Jeannette Grocholski

George Delgatty

Germaine Chauvette

Mike Hirney

Al Poncik

Maurice Chartrand

Philip Down

Jaswint Gill

Wednesday, April 2, 1986

LEAF RAPIDS

Workers

Douglas Spurrell

Jim Douglas

Sy Valois

Glen Woods

Labour

United SteelWorkers of America (Local 5757)
— Mike Malakoff, President
— Mike Gregorash, Injured Worker

United SteelWorkers of America (Local 8144)
— Rob Hilliard, President
— Ed Griffiths, Worker Auditor

Employer

Sherritt-Gordon Mines
— Al Weir, General Manager, Human Resources
— Bob Gerow, Supervisor, Loss Control
— Ken Ball, Manager

Thursday, April 3, 1986

THE PAS

Workers

John Towell
— assisted by Bill Benson

Tammy Lowden
— Carlene Bracegirdle
— Bill Benson

Elma Campbell
— Carlene Bracegirdle
— Bill Benson
— Jan Melanowich

Lucien Levesque
— Bill Benson

Mike Pavlek (Thompson Worker)

Labour

The Pas & District Labour Co-ordinating Committee
— Brian Beadle
— Jan Melanowich, Manitoba Government Employees' Association
— Bill Benson
— Carlene Bracegirdle, Service Employees Union

Friday, April 4, 1986

FLIN FLON

Labour

United SteelWorkers of America (Local 7106)
— Steve Hamon, Staff Representative

Workers

Angus Lavallee
— Bill Benson

Michael Hanishewski
— Mrs. Hanishewski
— Bill Benson

William Waugh

Employer

Hudson Bay Mining & Smelting
— Wayne Fraser, Director, Safety
— Marvin Dowhan, Superintendent, Safety

Monday, April 7, 1986

WINNIPEG

Workers

Jake Kehler

Paul Potier

Shigeto Shimoda

Labour

Manitoba Organizations of Nurses' Associations
— Vera Chernecki, President
— Jean Minish, Labour Relations
— Katherine Potechka, Chair, Occupational Health & Safety

United Transportation Union (Local 990)
— Christopher Cathcart, Health & Safety Representative

Amalgamated Transit Union (Local 1550)
— Harry Cohen, President & Business Agent

Tuesday, April 8, 1986

WINNIPEG

Workers

Walter Kuriata

Maria Oprckal

Gene Walterson

Alex Ungvary

Frank Wurm

Glen Taylor

Gilbert Daigneault

Franklin Souza

Monday, April 14, 1986

WINNIPEG

Employers

Abitibi Price
— Don Dimock, Safety & Training Officer
— Charlie Frederick, Industrial Relations

Guilford Domestic Service
— K. Guilford

Joanne Robinson
— Manitoba Child Care Association

Workers

John Marshall

Joseph Richards

Della Johnson

Mrs. A. Desmarais

Chuck Harris

Bill Scollnik

Tuesday, April 15, 1986

WINNIPEG

Workers

Monty Crowe

Marie Crowe

Cathy Diduck

Betty Carroll

John McFadden

Edward Kanski

Herbert Butler

Robert Paquette

Harry Smook

Anthony Joseph Drozdowsky

Wednesday, April 16, 1986

WINNIPEG

Employers

The Mining Association & Mines Accident Prevention Association
— Winton Newman

Boes Ltd.
— Bo Schussler

Workers

Michael Roblin
— on behalf of wife Anyas (Alberta Claim)

Dennis Beaudry (deceased)
— Patricia Vermette (daughter)
— Louise Russell (daughter)

Bert Chymyshyn
— Mrs. Chymyshyn
— John Huta

Rui Palma

Michael Genyk

Thursday, April 17, 1986

WINNIPEG

Workers

Pericles Vlachos
— Theresa Vlachos (daughter)
— Stella Toews

Edward Ernst

Ivan Zorko

Nick Shuhyta

John Barr

Frank Vajcsa

Albert Chaperon

Other

Injured Workers Association
— John Huta
— Bill Bordish
— Helen Woloshyn

Rehabilitation/Respiratory Hospital
— Dr. Bowie
— Bruce Harber

Monday, April 21, 1986

STONEWALL

Workers

Gwen Amy

Barry Wayne Stinson

William Begal
— Don Bailey (fellow worker)

Mr. Begal presented his own claim as well as a brief from Brotherhood of Locomotive Engineers, Local Division 583

Gerry Nugent
— Mrs. Nugent

James Mandziuk
— Mrs. Mandziuk

Tuesday, April 22, 1986

BEAUSEJOUR

Workers

Walter Abenstein

Bob Johnson
— Mrs. Johnson

Roy Monych
— Mrs. Monych

Mike Marowitch

Ernie Kolton

Tony Szymanski

Walter Bychuk

David Searle

John Zaggay

Wednesday April 23, 1986

SELKIRK

Workers

Roy Detlor

Bill Bowman
— Mrs. Bowman
(Martin Molotowski)
(verbal presentation limited to statement that he supports Mr. Bowman's points and need not make an individual submission)

Charles Jeffers
— Mrs. Jeffers

Tom Boyce

Jack Stevenson

Erika Dalebozik

T. Lorne Clarke

Labour

Selkirk & District Labour Council
(including United SteelWorkers of America)
— Eugene Laye, Staff, USWA
— Glen McDonald, USWA 5442
— Paul Chanas, USWA 5442
— Arnold Fertic

Thursday, April 24, 1986

STEINBACH

Workers

Jacob Wieler
— Mrs. Wieler

Ann Renz

John Perrault
— Mrs. Perrault

Dale Wright

Monday, April 28, 1986

PORTAGE LA PRAIRIE

Workers

Albert Oberton

Bertha Moffat
— Mr. Moffat

Tony Ukno

Laura Lee
— Ken Wilcox (son-in-law)

Harvey Frith
— Mrs. Frith

Tuesday, April 29, 1986

BRANDON

Labour

Brandon & District Labour Council
— Gordon Sweeney

Workers

Ed Hill
— Mrs. Hill

Gilbert Hughes

Evelyn Ratz

Ken Robertson

Art Dafoe

Employer

Quantum Electronics
— Cliff De Gobeo

Wednesday, April 30, 1986

BRANDON

Employers

Simplot Chemical Company
— C. R. Dudley, Safety Co-ordinator

Reesor's Jewellery
— Judy MacIntosh, Personnel

Brandon Chamber of Commerce
— Rick Chrest

Worker

Arthur Janzen

Thursday, May 1, 1986

DAUPHIN

Workers

Irene Folwark

Emily Ochitwa

Victoria Mazur

Louis Fayant

Mike Mushumanski

Nick Semchuk
— Mr. McKenzie (former M.L.A.)

Steve Ewanyshyn

C. Ronellenfitch

Arnold Edel

Joseph Mlynarowich

Dave Alexander

Garth Patterson

Ernie Kolodichuk

Monday, May 5, 1986

WINNIPEG

Labour

Manitoba Government Employees' Association
— Margaret Day, Health & Safety
— Annette Maloney, Vice President

Canadian Union of Public Employees (Manitoba Division)
— Bud Shiaro, Health & Safety

Canadian Brotherhood of Railway Transport & General Workers
— A. Cerilli, Regional Vice President

Canadian Union of Public Employees (Provincial Health Care Council)
— Ken Grant, Chairperson
— Lorraine Sigurdson, Executive
— Bud Shiaro, Health & Safety

Workers

Greg Schwark

Kris Anderson

Norman Allard

Jose Santos

Walter Domish

Walter H. East

Tuesday, May 6, 1986

WINNIPEG

Employers

Advance Electronics
— Richard Duy
— Arnold Freeman

Western Engine Limited
— Brian McAughey

Manitoba Fashion Institute
— Ray Winston

Horstman Piling Contractors
— Horst Lohre
— William McMahon

Workers

Robert Canady

Everett Cramm

Gordon Gibson
— Mrs. Gibson

Joseph Millan

Wednesday, May 7, 1986

WINNIPEG

Labour

Manitoba Firefighters Association
— Bill Laird, President
— Martin Johnson, Legislative Chairman

Manitoba Food & Commercial Workers #832
— Darlene Dziewit

Communications & Electrical Workers of Canada
— Howie Raper

Brotherhood of Railway & Airline Clerks
— Al MacDuff

Workers

Elsie Babiak

Leta Tomko

Marcel Dubois

Steve Stacky

Hazel Martin

Thursday, May 8, 1986

WINNIPEG

Workers

Henry Kwiatkowski

Catherine Fedusiak

Rudi Terhoch
— Mrs. Terhoch

Fred Brennan

Rudy Peters

Doris Kidd

John Kidd

Joseph Blei

Lloyd Preston

Patrick Murphy

Mr. Kim Morfoot

Monday, May 26, 1986

WINNIPEG

Employers

Seel Carpet Cleaners
— Brian Segal

Thiessen Management
— Peter Thiessen

Purolater Courier
— Dan Godfrey

Workers

Allan Granovsky

Wilda Saunders

Olive Orr

Cecilio Villanueva

Agnes Halliday

Richard Stefanec

Tuesday, May 27, 1986

WINNIPEG

Workers

Anne Olexy

Mireille Halimi

Luigi Marinelli

Mrs. H. Gregory

Jose Santos

John Brabant

Guertie Hokanson

Colin McGregor

Wednesday, May 28, 1986

WINNIPEG

Employers

Manitoba Employers Task Force
— Mike Cuma, Canadian Manufacturers Association
— Dale Botting, Canadian Federation of Independent Business
— Elaine Smith, Chamber of Commerce
— Bill McGill, Manitoba Meat Packers

Manitoba Hotel Association
— John Read

Western Grain Elevator Association
— Cal Roberts (United Grain Growers Safety Division)

Workers

Joseph Snobl

Machelle Schnidermann

Jody Kaulfuss
— on behalf of Reinhardt Kaulfuss

Otto Hintz

Reuben Houle
— Mrs. Houle

Thursday, May 29, 1986

WINNIPEG

Workers

Peter Pidsadny

Fern Morier

Lottie Wade

Monday, June 2, 1986

WINNIPEG

Employers

Manitoba Trucking Association
— Clarence Yackel

Workers

Connie McLure

Larry Wilson

Andrew Rydzak

Walter Stoykewich

Marla Duguay

Ken Kitchen

Charles Lacroix

Ms. Gay Martin

Mike Turick
— Mrs. Turick

Tuesday, June 3, 1986

WINNIPEG

Workers

Gordon Kitchikesik

Phillip Moffatt

Glen Turner

David Townsend

Manuel Santos

Doug Moore

Robert Gallop

Wednesday, June 4, 1986

WINNIPEG

Labour

Winnipeg & District Labour Council
— Heather Grant, President
— Sandra Trowski, Executive Member

Canadian Union of Public Employees (Local 500)
— John Irvine

United Food & Commercial Workers (Local 111)
— Harry Mesman, Business Representative
— Bruno Zimmer, President

Workers

Gary Kinden
— Michael Davids

John Bodnaruk

Phillip Gabinet

Greg Connolly

Thursday, June 5, 1986

WINNIPEG

Workers

Frank Schumak

John Giesbrecht

Theresa Rougeau
— Gerald Rougeau

Ray Harbridge

Ray Kowalchuk
— Geraldine Kowalchuk

Ralph Pratt

Maurice Pankhurst

John Jolicoeur

Monday, June 9, 1986

WINNIPEG

Other

Manitoba Federation of Labour Occupational Health Centre
— Beverly Cann, R.N.
— Dr. Annalee Yassi
— Dr. Roland Wong
— Judy Cook Hannibal, Executive Director
— Dorothy Wigmore, Occupational Hygienist

Dr. A. Nassar

Victoria Health Guard
— Norma McCormick

Labour

International Association of Machinists and Aerospace Workers, Lodge 484
— Paul Van Wart
— D. Grenier
— E. Fullerton

Tuesday, June 10, 1986

WINNIPEG

Workers

Paul Edward Tompkins

Henry Wojciechowski
— Mrs. Wojciechowski

Gunther Werner

Antonio Vieira

Reg Gray
— Lynn Gray

Joseph Kozie

Wednesday, June 11, 1986

WINNIPEG

Employers

Broadcasters of Manitoba
— Bob McDonald

Canadian National Railways
— George Croft, Claims Manager
— Frank Campbell, Vice President, Prairie Regional

Winnipeg Construction Association
— Don Kunderman, Vice President
— Ed Stanton, Legislative Committee
— Girvin Greasley, Vice President

Manitoba Meat Packers Safety Council
— Don DuFour, Burns
— Jack Levin, East-West
— Bill McGill, Canada Packers

Prairie Implement (PIMA)
— Fred Blunderfield, Chairman, Legislative Committee
— Larry Krocker, Member
— Keith Vidal, Member
— Ron Zimmer, General Manager

Workers

Gerald Cochrane

Mrs. Ritma Jurevics

Frank Sabatini

Marisa Grassi

Mrs. Z. Krcadinac

Tuesday, July 8, 1986

SELKIRK

Workers

Wayne Bell

Peter Shuparski

Allan Hogue

Ken Chamberlain

Ray Mannara

Employer

Mandak Metal Processors
— Tom Tonner

Wednesday, July 9, 1986

WINNIPEG

Employers

Max Wilde Window Cleaning
— Bert Goetz

Canadian Federation of Independent Business
— Dale Botting

Canadian Pacific Railways
— J. D. Champion
— C. W. Baum
— W. F. Smith
— J. S. McLean

Labour

Public Service Alliance of Canada
— Clint Hornby

Canadian Auto Workers
— Jim Gill, Director, Health & Safety
— Terry Kennedy, President, Local 144
— Peter Magda, President, Local 2224

Other

Association of Physiotherapists of Manitoba
— Christopher Snow, Professor
— Art Ladd, Vice-Chairman
— Deborah Gillespie, Chairman

Thursday, July 10, 1986

WINNIPEG

Other

Worker Advisor Office
— John McNevin, Director
— Margaret Ross
— Rick Farley
— Jasper Robinson
— Carol Potter
— Bill Benson
— Carl Arjoon
— Gary McMillan
— Carol Wolitzer
— Karen Cube
— Arlene McEachern
— Rod Frisken

Monday, July 14, 1986

WINNIPEG

Workers

John Kramer
— Michelle Kramer (wife)

Jack Burdett

Lynda Forman

Anne Monchak

Alan Wilson

Debbie Breen
— David Breen (husband)

Mrs. Joan Verhaeghe
— Vernon Verhaeghe (husband)

Jean Paul Lefebvre
— Carol Jones

Jose Vieira

Tuesday, July 15, 1986

WINNIPEG

Workers

Eric Swanson

Gerald Saraillon

David Searle
— appearing for Mike Marowich

Raymond Moroz
— Irene Moroz (wife)

Benoit Nault

Peter Pendyk

Wednesday, July 16, 1986

WINNIPEG

Workers

Abe Klippenstein

David Haggan
— Helen Haggan (wife)

Joe Stratichuk

Shirley Morrissette

Betty Lutz

Tony Gabriele

John Thiessen

Lorraine London

Marcel Tremblay

Thursday, July 17, 1986

WINNIPEG

Workers

Alfred Berard

Ike Klassen

Joe Komadowski
(represented by his wife June)

Marcel Trudel

Peter Ellie

Friday, July 18, 1986

WINNIPEG

Other

Manitoba Chiropractic Association
— Richard Seier, Vice President
— Gilbert Bohemier, President
— Chris Martin, Counsel

Monday, July 21, 1986

WINNIPEG

Workers

Doug MacNair

Harold Deneka

Edith Gagen
— Henry Gagen (husband)

Walter Reeve

Maria Fernandes
— Jack Fernandes (husband)

Sue Nelson

Stan Burnell

Gary Schmidt

Olive Neufeld
(representing William [deceased])

Nellie Laroque

Alberta Grant (widow)
Edward Grant (deceased)
— both represented by Gene Grant (son)

Tuesday, July 22, 1986

WINNIPEG

Employers

Manitoba Health Organizations
— Doug Machan, Director of Personnel Services

Loewen Windows
— Charles Loewen, General Manager
— Lloyd Plett, Controller
— Laverne Derksen, Worker Co-Chairman

City of Winnipeg
— Les Hutcheon, Acting Commissioner Finance
— Elaine Smith, Workers Compensation Board Coordinator

Wednesday, July 23, 1986

WINNIPEG

Workers

Angelo Zaglaris

Armand Bisson
— Margaret Day, Manitoba Government Employees' Association Representative

Ian Barron

John Inch

Jack Bernhardt

Dennis Nelson

Keith Jefkins

Labour

Canadian Association of Industrial Mechanical & Allied Workers
— Cathy Walker
— Pat McEvoy

Employer

Manitoba Rolling Mills
— Don Toth, Safety Supervisor
— Rod Leduc, Manager, Employee Relations

Thursday, July 24, 1986

WINNIPEG

Employers

Manitoba Motor Dealers Association
— Jim Carey, President
— Cal McKeag, Manager (Executive Director)

Manitoba Built-Up Roofers Association
— Ed Gallos, Master Roofing
— Lorne Siemens, Flynn & Associates

Other

Albert Van Huizan
— Safety & Loss Control Officer at Supercrete (appearing as an individual)

Labour

International Association of Machinists & Aerospace Workers, District 181
— Sandra Trowski, Secretary
— Bill Whiteside, E.M.T. Ambulance Service

Workers

Anne-Marie Munnik
— Elaine Olynick
— Lorraine Sigurdson

Friday, July 25, 1986

WINNIPEG

Other

Manitoba Government Services
— Derek Legge

Department of Environment Workplace Safety and Health
— Debbie Sava
— Lorna Hendrickson
— Jerry Speigal

Wednesday, July 30, 1986

WINNIPEG

Other

Alan Botan (lawyer)

Association of Occupational Therapists of Manitoba
— Susan Parr
— Kathy Mann

Employers

Canada Post
— Jim McCaul, Director, Health & Safety
— Don McGregor, Legal Analyst
— Alex Koziball, Manitoba Workers Compensation Board

Manitoba Heavy Construction Association
— Don Epler
— Burt Galley
— Bill Jarand

Labour

Manitoba Building Trades Council
— Leo Desolais, President
— Frank Thomas, Secretary
— Roger Beaudette

Workers

Ron Houssin
Rose Dubuc
Edmund Swinn

Thursday, July 31, 1986

WINNIPEG

Employers

Winnipeg Chamber of Commerce
— John Doole
— Winton Newman
— Elaine Smith

Labour

Manitoba Federation of Labour
— Wilf Hudson, President
— Jim Gill, Canadian Auto Workers
— Margaret Day, Manitoba Government Employees' Association
— Harry Mesman, Manitoba Federation of Labour/ United Food & Commercial Workers
— Lorraine Sigurdson, Canadian Union of Public Employees
— Howie Raper, Communications & Electrical Workers of Canada

Friday, August 1, 1986

WINNIPEG

Employers

Canadian Manufacturing Association
— Bill Easton, President
— Jack Benedict, Past-President

Other

Manitoba Association of Rights & Liberties
— Norman Rosenbaum
— Lisa Caldwell
— Sybil Shack

Monday, August 18, 1986

WINNIPEG

Other

Worker Advisor Office
(see July 10) (continued)
Janet Sprout also attended

Tuesday, August 19, 1986

WINNIPEG

Other

Manitoba Medical Association
— Dr. Roland Wong
— Dr. W. Krywolak

Wednesday, August 20, 1986

WINNIPEG

Other

Medical Review Panels of Manitoba
— Dr. Thomas Goodhand

Section 100 Committee
— Art Coulter, Past Chairperson
— Roger Beaudette, Sheet Metal
— Dennis Sutton, Bristol Aerospace
— Ken Wylie, Workers Compensation Board
— Bruno Zimmer, United Food & Commercial Workers

Thursday, November 6, 1986

WINNIPEG

Other
Nels Thibault and
William Kennedy

January 23, 1987

WINNIPEG

Other

The Workers Compensation Board of Manitoba
— Sonny Arrojado
— Don Bulloch
— George Davis

February 29, 1987

WINNIPEG

Other

Dr. Peter Warren

APPENDIX C

OPERATION OF PRESUMPTIONS IN WORKERS' COMPENSATION LEGISLATION

I. THE LEGAL CONCEPT OF PRESUMPTION

Presumptions are, essentially, devices of the law of evidence. Their purpose is to dispense with the necessity of formal proof of certain items, or at least to facilitate the proof thereof. On certain occasions, a presumption will dictate the legal consequence which the decision-maker **must** apply when certain facts are proven.

Since presumptions are evidentiary devices, they are often viewed by lay people in a pejorative way as being mere "technicalities," having nothing to do with the real merits of their cases. In one sense this is true, since presumptions may be imposed on certain fact situations in order to produce results that otherwise would rarely occur and this understandably appears arbitrary. But the fact that this may appear to be so does not mean that presumptions may be disregarded or weakened by the decision-maker. Presumptions are admirably suited to the promotion of specific, wider social policies and usually it is for this purpose that legislatures insert them in statutes. And a legislature, of course, may be as arbitrary as it wishes, subject only to the protections afforded by the Charter.

As technical, evidentiary devices, the functioning of presumptions can only be understood in terms of its relationship to broader concepts of the law of evidence such as the onus or burden of proof. Therefore, prior to discussing the niceties of presumptions, a brief outline of the concept of burden of proof is in order.

A. BURDEN OF PROOF

The general rule is that the person who asserts a fact, must prove it. Therefore, people who initiate court cases either as private litigants (plaintiffs) or as prosecutors (the state) are said to bear the legal onus or burden of proof. The person against whom a court case is brought (the defendant, or, the accused, respectively) is not obliged to prove or disprove anything and, in terms of the **legal** burden of proof, may remain silent without a negative inference being drawn from that silence.

The legal burden of proof acts as a set of scales when the time comes to decide who wins the case and becomes of crucial importance when the evidence on both sides is evenly balanced. Since in civil cases, the plaintiff must prove the case "on the balance of probabilities," an evenly-balanced case will be decided in the defendant's favour, not the plaintiff's, because the plaintiff bears the legal burden of proof and an even balance means that it has not been discharged.

The legal burden of proof does not shift back and forth between the two parties to a case except in one circumstance: where there is a rebuttable presumption of law. Short of this, it stays only with one side.

Distinguished from the legal burden of proof is the "evidentiary burden of proof." The evidentiary burden shifts constantly between the two sides as a practical matter of course. If the plaintiff brings evidence supporting an allegation, the defendant would be foolish, practically speaking, not to bring evidence at least to nullify the plaintiff's evidence. But legally speaking, the defendant is not obliged to, since s/he does not bear the legal burden of proof. So if the plaintiff's evidence is weak and does not prove the case on the balance of probabilities, the defendant is entitled to win the case even if the defendant presented weak or no evidence disproving the allegation.

B. TYPES OF PRESUMPTIONS

The broadest distinction between types of presumptions is that between presumptions of law and presumptions of fact. What is the difference?

> Presumptions of law are a consequence 'annexed by law to particular facts'. A presumption of fact is 'an inference which the mind naturally and logically draws from given facts, irrespective of their legal effect'.[1]

A presumption of law has the effect of shifting the legal burden of proof onto the person who does not ordinarily bear it.[2] The importance of this shift is that the defendant then becomes positively legally obliged to disprove the presumed fact or consequence. Silence will be held against the defendant and s/he will lose the case. This shifting of the legal burden of proof is what is meant by a "reverse onus."

A presumption of fact does not shift the legal burden of proof. It shifts only the evidentiary burden of proof, leaving the legal burden still with the plaintiff.[3] Since the evidentiary burden usually shifts as a practical matter anyway, one may well ask what distinguishes a presumption of fact. Presumptions of fact usually arise in situations where any plaintiff's evidence would appear overwhelming by the very nature of the evidence itself. So, for example, if a person opens a can of beans and discovers a dead rat in it, the evidence of negligence on the manufacturer's part appears pretty incontrovertible, since surely there could be no possible reasonable explanation accounting for the dead rat's presence. So, presumption of fact describes those situations where "the facts are such that a certain inference should, but need not, be logically drawn."[4]

There is one other basic distinction between types of presumptions. Some presumptions are conclusive and others are rebuttable.

Conclusive presumptions are final and absolute; no evidence to the contrary will even be heard by the decision-maker. Such conclusive presumptions are also called irrebuttable presumptions. By definition, a conclusive presumption causes no shift in either the legal or evidentiary burden since such a shift would be meaningless. Because of the potential for harshness in their operation, conclusive presumptions are rare at common law and are always statutory in nature.[5]

Rebuttable presumptions, of course, are those whose effects may be dispelled by evidence to the contrary. The presence of a rebuttable presumption does not mean the decision-maker has a discretion whether to apply it or not, but rather, the presumption's effects can be avoided only if the opposing evidence disproves the presumption on (generally) the balance of probabilities.

A presumption of law may be either conclusive (no shift of legal or evidentiary burden) or rebuttable (shift of legal burden of proof; "reverse onus"). A presumption of fact is always rebuttable (shift of evidentiary burden of proof only).[6]

C. A NOTE ON REVERSE ONUS

When a rebuttable presumption of law shifts the legal burden of proof to the defendant, it does so only for the issue upon which the presumption operates. The legal onus for the rest of the case will remain with the plaintiff. If the presumption operates on the central, crucial issue of the case, the shifting of the legal onus essentially becomes for the case as a whole.

Section 11(d) of the Charter, which entrenches the presumption of innocence, has been successfully used to strike down reverse onus provisions, especially those found in the *Narcotic Control Act*. Whatever the effect of s. 11(d) may be, the law is clear that it applies only to criminal or quasi-criminal offences, and has no bearing on civil, domestic or tribunal matters. S. 11(d) therefore poses no challenge to any reverse onus in Workers' Compensation legislation, if indeed one may even speak of reverse onuses in this area, as will be discussed in the next section.

D. SHIFTING ONUSES AND WORKERS' COMPENSATION

The formulation of the nature and effect of presumptions developed in the context of our general legal system, which of course is adversarial in nature—a contest between two opposing parties, presided over by a disinterested third party who remains passive in the area of introduction of evidence.

This of course is not the system found in workers' compensation. As Ison summarizes:

> The Acts establish an enquiry process, not an adversary system. There is, therefore, no burden of proof on anyone except the Board. The worker, the employer, and the attending physician are responsible for supplying information **as requested and which it is within their power to provide.** With regard to any other information that may be required, the obligation rests with the Board to make the necessary enquiries.[7]

Note that Ison places both the legal and the evidentiary onus squarely on the Board. The claimant's role is as a source of evidence at the initiative of the Board, not as the one responsible for deliberately raising any evidence on his/her own initiative. This view is consistent with the primary distinction between an inquisitorial and an adversarial system.

But this often appears to be obscured, if not actually reversed, in decisions relating to workers' compensation. Frequently, the impression is left that the claimant is under an actual legal onus to prove, in a positive sense, his/her claim or at the least, under the primary evidentiary onus of proof.

Moreover, in the case of *Kuntz and Dagenais* v. *Workers' Compensation Board (Ontario)*,[8] which dealt with the interpretation of the standard presumption concerning accidents occurring during the course of employment being rebuttably deemed to arise out of the employment (and vice versa), Mr. Justice White, in his dissenting opinion at the Ontario Divisional Court level, stated that:

> The applicants submitted their cases on the basis that by virtue of the place where each of their 'cerebral vascular accidents' occurred, that is the work place, that an **evidentiary burden** was placed by the statute on the W.C.B. It is wrong in my opinion to talk of shifting burdens of proof as between a claimant and the Board under the Act. The Board is an investigative and

> adjudicative tribunal. It makes an active inquiry for evidence in support of and contrary to a claim.[9]

This statement being *obiter dicta* in a dissenting judgment means it has no legal effect, but as a statement of judicial opinion, it is submitted that it raises an important consideration.

If Mr. Justice White is correct in his statement that the burden of proof (either legal or evidentiary) does not notionally shift under the workers' compensation system—and such logic is consistent with the non-adversarial structural nature of the process—then it would appear to follow that practical and theoretical problems could arise in using presumptions when the question is posed whether a presumption has been rebutted or not. In short, the Board itself bears both the burden of initiating and finding the evidence to rebut the presumption and of deciding whether such evidence is sufficient to rebut. This dual role is rather incestuous, so to speak, and seems inconsistent with the technical device of presumptions. (Having been saturated with the adversarial system, I may, however, be unduly blind about this apparent illogic.)

A final comment on Mr. Justice White's dissent: although never overtly stated, it **appears** from the tenor of his judgment that he believes the evidentiary burden (and presumably, the legal onus as well) rests with the claimant, not the Board. Such a view would be incorrect.

II. PRESUMPTIONS COMMON TO WORKERS' COMPENSATION LEGISLATION

Presumptions abound in workers' compensation legislation; the great majority are very specific in nature and relate to clearly defined situations. These will be categorized generally and briefly described at the end of the paper, since the content of such presumptions or even their presence tend to vary widely between jurisdictions. They often reflect local conditions and specific provincial policy rather than broad general principles of workers' compensation.

There are, however, two common presumptions and one common rule of procedure which do represent broad general principles of the Canadian idea of workers' compensation and these shall be explored in more detail. These "broad presumptions" tend to apply to all claims and so are worded more vaguely than the "specialized presumptions."

A. BROAD PRESUMPTIONS

1. "OUT OF/IN COURSE OF EMPLOYMENT"

All provincial workers' compensation acts have a provision creating a general presumption to aid in the categorization of injuries/accidents as both arising out of and in the course of employment.

Eight of the provincial sections are similar enough to be considered together for comparative purposes, while only two provinces (Quebec and Saskatchewan) have sections noticeably different in wording.

(a) THE "STANDARD" PROVISION

New Brunswick's provision gives the standard format:

> s. 7(2) When the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, and when the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.[10]

The Newfoundland statute uses the term "injury" instead of "accident,"[11] but "injury" is defined in the same way as other jurisdictions use "accident" so the difference in wording is not one of substance. Also, the British Columbia act uses the phrase "In cases where the injury is caused by accident, where the accident arose..." etc.[12] but again the difference is one of form only.

The only other major variation in wording is that the Manitoba act uses the word "proven" instead of "shown," as in "unless the contrary is proven."[13] It is submitted that this merely clarifies the position that prevails under all the acts, *viz.* that there is not a lesser standard of proof required to rebut the presumption than that which is used in adjudicating any matter under the act. Everything must be proved/rebutted on the "balance of probabilities."

Therefore, these eight provinces (British Columbia, Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland) all basically provide for an expressly rebuttable, mutual presumption concerning the two requirements that would otherwise have to be individually and positively proven in each and every claim in order for it to be compensated—namely, that the accident/injury both arose in the course of employment (usually a time and place factor) **and** arose out of the employment itself (usually the factor causing the actual injury).[14]

That these two requirements must both be proven is axiomatic; indeed, most provinces state right in the definition of "accident" or "injury" that it must both arise out of the employment and occur during the course of the employment in order to be an "accident" or "injury" under the Act in the first place.

This presumption section can only be understood, it is submitted, in terms of this threshold definition. The proposition will be advanced that it modifies the absolute nature of the proof required to satisfy the definition of "accident" and thus is a time-saving device. In "obvious" cases falling within the definition, it allows the adjudicator to draw certain inferences automatically without (as would otherwise be the case) having to require the leading of formal positive evidence on that point.

The second benefit of this section is that it makes clear that there must be positive proof **against**, rather than **for**, the proposition that an accident arose out of and in the course of employment, thus establishing a starting point or premise which works to the claimant's favour. This does not mean, however, that (given the facts) the presumption may not be very easy to rebut.

It also serves a crucial function in "borderline" cases where there may or may not be evidence sufficient to rebut the presumption. Remember that the general rule when dealing with the civil standard of proof on the balance of probabilities is that, if the evidence is evenly balanced, the "benefit of the doubt" goes to the person from whom damages are sought—not to the person who claims the damages. The practical effect of this presumption is to reverse this common law situation so that the claimant will have the benefit of the doubt, when all else is equal.

This is a relatively rare effect, because it only benefits the claimant in that narrow fact situation when the evidence is perfectly balanced, but when that narrow fact situation does arise, it works to produce a result which would not obtain at common law.

How do Boards view the manner in which this presumption should be applied?

In Ontario, the Board's policy has recently come under court scrutiny in *Kuntz and Dagenais* v. *Workers' Compensation Board of Ontario*.[15] The Ontario Court of Appeal held that the Board was correct to apply a two-step process:

> 1) the first question to be answered is whether there is an "accident" within the meaning of the definition of that term in the Act. This involves a consideration of whether the injury was work-related or, in other words, whether the injury was precipitated by an **"external event"** which must **itself** arise out of or in the course of employment;
>
> 2) only if this is satisfied, does the presumption arise for consideration.

In this case, the claimant Kuntz suffered the rupture of a congenital arterio-venous malformation; the claimant Dagenais sneezed and suffered a ruptured aneurysm of a cerebral artery. In both cases it was found as fact that these injuries could have occurred any place at any time; it was simply chance that they occurred on the job. No job factor induced the injuries.

The Board denied the claims on the basis that the first part of the test had not been met (so there was no question of applying the presumption). The Court of Appeal approved this approach to the definition of "accident" as "being within the range of possible interpretations of 'accident'…[and not] so patently unreasonable that their construction cannot be rationally supported."[16] (This is sort of "left-handed" approval—it means that a court might very well define "accident" differently, but the Board's interpretation is not so far out in left field that it simply cannot be tolerated as an absolute breach of logic.)

The British Columbia approach is the same two-step process. First, the definition of "accident" must be satisfied, and this includes an employment-related factor. As stated in the B.C. *Rehabilitation Services and Claims Manual:*[17]

> the presumption only operates when the injury results from an 'accident.' This term is defined in Section 1 to include a 'wilful and intentional act, not being the act of the worker,' and a 'fortuitous event occasioned by a physical or natural cause.' This is not an exclusive definition of the term, but the word has been interpreted in its normal meaning of a traumatic incident. It has not, for example, been extended to cover injuries resulting **from a routine work action** or a series of such actions lasting over a period of time.

The *Manual* goes on to discuss various kinds of fact situations, categorizing them as "compensable" or "not compensable." Although the basis for some claims being "not compensable" is not clearly delineated, it appears that such claims would be found not to fall within the threshold definition of "accident" rather than being cases where the presumption arises and is rebutted. So, for example, when dealing with a "Kuntz and Dagenais"-type situation, the *Manual* provides:

> It is necessary to distinguish between injuries resulting from employment (which are compensable), and injuries resulting from purely natural causes (which are not compensable).
>
> An injury is not compensable simply because it happened at work. It must be one arising out of and in the course of employment. If it happened at work, that usually indicates that it arose in the course of the employment. But it must also have arisen "out of" the employment. This means that there must have been something in the employment relationship or situation that had causative significance in producing the injury.
>
> But if the injury was one arising out of purely natural phenomena—the internal workings of the human body—the employment situation may then be an irrelevant coincidence, and if so, the injury is not compensable.[18]

This "two-step approach," it is submitted, is not the best way to decide whether the presumption "applies" or not. It seems to me that this approach "begs the question" by essentially reading in to the statutory definitions of the term "accident" a requirement that, even if an injury occurs during the course of employment, there must be a prima facie causal relationship between the chance injury and the work environment (the "external event") in order to satisfy the threshold definition. If there is no such prima facie relationship, the definition is not met and it is said the presumption does not arise. But the whole point of the presumption is to facilitate proof of the very factor which is thereby made a precondition to the operation of the presumption! It is circular logic and, it is submitted, eviscerates the whole point of having the presumption in the first place.

What is the true relationship between the definition and the presumption? It is submitted that the correct view is as follows. Using the Manitoba definition of "accident," note that it is a definitional requirement that the "event" or "thing that is done," to be considered an accident, must both arise out of **and** in the course of employment:

> 2 (1) In this Act.
>
> (a) "accident" means, subject to subsection (10), a chance event occasioned by a physical or natural cause; but also includes
>
> (i) a wilful and intentional act that is not the act of the workman; and
>
> (ii) any
>
> (A) event arising out of, **and** in the course of, employment; or
>
> (B) thing that is done and the doing of which arises out of, **and** in the course of, employment; and
>
> (iii) conditions in a place where an industrial process, trade, or occupation is carried on, that occasion a disease;
>
> and as a result of which a workman is disabled.

If the two-step approach is correct, does this mean that both elements must be proven before the presumption arises? What would then be the point of the presumption? It would be superfluous.

Therefore, the point of the presumption must be to facilitate proving these definitional requirements. And so it follows that the presumption **always** "arises" and "applies" automatically, and should always be considered. One does not meet the definition in order to consider the presumption; one considers the presumption in order to meet the definition.

Therefore, in my opinion, the presumption should have been considered in the Kuntz and Dagenais case (for example). The injuries were sustained during the course of employment. It is therefore presumed that the injuries arose out of the employment—unless there are facts to prove otherwise. Are there such facts? If the evidence shows the injury could have occurred anywhere and only happened to occur at work with no work factor precipitating it, then the presumption will be rebutted. The result—it would not be compensable because the definition could not then be met.

As can be seen, the result may be the same; only the process of reasoning differs. So why is the process important? Because of those small minority of cases where the evidence is evenly balanced—there the claimant must receive the benefit of the doubt. Using the two-step process deprives the claimant of that benefit because the claim will be denied at the so-called "first" step before the benefit of the doubt comes into play.

A case from New Brunswick shows the correct process being used. In *Dunham* v. *Workmens' Compensation Board*,[19] a firetruck driver with pre-existing heart disease suffered a fatal coronary at the scene of a fire, while performing his normal duties. The evidence was evenly balanced concerning whether the death arose out of the employment. The Board said there must be proof of unusual exertion or effort and, in the absence of such proof, the presumption would be rebutted.

The New Brunswick Court of Appeal rejected the concept of unusual exertion or effort being necessary. The case was to be approached as follows:

> It was found by the Board that death occurred in the course of employment; there is therefore a presumption under s. 6(2) of the Act that death arose out of the employment.
>
> The evidence discloses that the deceased may have died of excitement or exertion in the course of his employment or may have died in any event without these factors in any way contributing and so, being equivocal, does not rebut the presumption that death arose out of his employment.[20]

This being the case, the widow was entitled to compensation.

The Manitoba policy, as contained in the Memorandum "Claims Adjudication—Some Points to Consider"[21] and "Workers' Compensation Act—Section 4(5)—Rule of Presumption"[22] (attached hereto as Schedules A and B, respectively), appears to comprehend the nature of this presumption as providing the benefit of the doubt to claimants. While the wording is awkward, the application of the presumption seems to be properly grasped; there is no indication of the "two-step process" being advocated. I believe the wording could be troublesome because of the dichotomy used between the presumption being "applicable" and "not applicable" (see especially page 3 of the Memorandum). This is an unfortunate, (though understandable,) choice of language. Clearly what the writer means by the presumption being "not applicable" is that it has been rebutted successfully. Using the two terms as interchangeable, however, could lead to adjudicators believing they do not even have to consider the presumption section at all in certain circumstances.

(b) TWO DIFFERENT PROVISIONS

The Saskatchewan presumption[23] reads like other provisions except for one rather amazing difference—the presumption is not expressly stated to be rebuttable.

> 29. Where an injury to a worker arises out of his employment, it is presumed that it occurred in the course of his employment and, where the injury occurred in the course of his employment, it is presumed that it arose out of his employment.

Prior to the 1979 amendments, when this version of the section first appeared, the section expressly modified the presumption by the standard phrase "unless the contrary is shown."[24] The phrase's absence from the new version seems to lead to the conclusion that the Saskatchewan legislature has deliberately established an irrebuttable presumption of law in this area.

The definition of "injury" in the Saskatchewan Act contains the standard dual requirements that it must arise out of **and** in the course of employment. But if s. 29 indeed creates an irrebuttable presumption, then only one element need actually exist since the other will thereby be automatically and incontrovertibly presumed.

Such a move tremendously broadens the scope of compensable accidents. It is arguable, however, that the use of the word "presumed" rather than "deemed" maintains the rebuttable nature of the presumption thereby created. The section has been considered by no court and of course the Saskatchewan Board decisions and policy manual are not publicly available, so it is unknown how the Saskatchewan Board views this section.

Quebec's situation appears to be very different. Note that in the definition of "industrial accident," there is no requirement that it arise both out of **and** in the course of employment, but rather, either criterion will suffice:

> **"industrial accident"** means a sudden and unforeseen event, attributable to any cause, which happens to a person, arising out of **or** in the course of his work and resulting in an employment injury to him;[25]

An "employment injury" is defined as follows:

> **"employment injury"** means an injury or a disease arising out of or in the course of an industrial accident, or an occupational disease, including a recurrence, relapse or aggravation;[26]

Because of the definitional difference, the presumption section is extremely straightforward, and note that it too is not expressly stated to be rebuttable:

28. An injury that happens at the workplace while the worker is at work is presumed to be an employment injury.

2. PRESUMPTIVE SCHEDULES IN INDUSTRIAL DISEASE

The second "broad presumption" commonly found in workers' compensation legislation is the presumption concerning proof of a causal relationship between employment at particular jobs/work processes and certain industrial diseases.

All provincial jurisdictions except Manitoba and Saskatchewan utilize the presumptive schedule approach. Ison has neatly summarized the operation of this type of general presumption:

> In most jurisdictions, a schedule of industrial diseases is included in the Act, or in regulations. The schedule is in two columns. The first is a list of diseases. Opposite each disease there appears in the second column the type of industry or process that has been known to cause that type of disease. The schedule serves two purposes. First, the mention of a disease in the schedule establishes that it has been recognized as an industrial disease. Secondly, if a worker who has a disease in the first column was engaged in an industry shown opposite that disease in the second column, it is presumed that the disease resulted from industrial exposure unless the contrary is proved. It is unlawful for a board to impose any additional requirement before applying the presumption.
>
> Where a disease is not listed in the schedule, or where column two of the schedule does not apply, the Board must enquire and determine from the evidence, including the circumstantial evidence, whether the employment exposure was likely to have contributed to the disease, or whether it was more likely to have resulted entirely from other causes.[27]

The primary purpose of this presumption is the same as for any presumption in workers' compensation: it changes the starting premise from the proposition that "the causal link must be positively proved" to "the presumed causal link must be positively disproved"; it serves to facilitate or dispense with formal proof in "obvious" cases; and it overturns the common law position concerning who should get the benefit of the doubt in an evenly-balanced case.

(As to the specific provisions in the various Acts, these have been canvassed in the prior paper prepared for this Committee—"Occupational Disease: Legislative Overview," May, 1986—and will not be repeated here.)

In Manitoba, as stated, there is no such presumptive schedule. However, the definition of "accident" in s. 2(1)(a)(iii) clearly includes conditions occasioning industrial diseases. Therefore, insofar as any entitlement to compensation depends on the disease having arisen out of and in the course of employment (as required by s. 4(1)), then the worker will have the benefit of the relevant presumption in s. 4(5).

Specific presumptions have been created for firefighters in Manitoba[28] concerning disabilities affecting heart, lungs, brain or kidneys.

3. "BENEFIT OF THE DOUBT" SECTIONS

This is the "rule of procedure" referred to in the introduction to this part of the paper; although it has been categorized under the discussion of "Broad Presumptions" it is not, in fact, a presumption in any sense of the word. However, the effect of this rule of procedure is similar to one effect of the broad presumptions we have seen thus far and so is raised now.

It has been shown how presumptions relate to the standard of proof in compensation cases and how one effect is to give claimants the "benefit of the doubt" where the evidence otherwise is evenly balanced. This reverses the common law situation where the person from whom payment is sought receives the benefit of the doubt (so to speak) in a similar situation.

Where a presumption does not operate, however, this effect obviously does not occur. To remedy this, and to give the claimant the benefit of the doubt on all issues where evidence is otherwise evenly balanced, half the provincial jurisdictions have enacted "benefit of the doubt" sections as a general rule of procedure.

These provisions come in two basic formats. One format makes it clear that what is being dealt with is the situation where the evidence is evenly balanced. The B.C. legislation provides in s. 99 that:

> 99.The board is not bound to follow legal precedent. Its decision shall be given according to the merits and justice of the

> case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker.[29]

The Ontario provision is similarly explicit:

> s. 3(4) In determining any claim under this Act, the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.[30]

The other format is much more vaguely worded but its effect is exactly the same. The P.E.I. provision cited here is similar to the ones contained in the Newfoundland[31] and Nova Scotia[32] legislation.

> 17. Notwithstanding anything in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt, which means that it is not be [sic] necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but that the board is entitled to draw and shall draw from all the circumstances of the case, the evidence and medical opinions, all reasonable inferences in favour of the applicant.[33]

Nothing in such provisions means that claimants should always receive compensation, or that a claimant's weak evidence should always prevail over strong evidence to the contrary. It applies only in one narrow situation—where the evidence is inconclusive one way or the other (evenly balanced). If the evidence is not evenly balanced, consideration of the section does not even arise.[34]

It is submitted that such "benefit of the doubt" provisions, although modest in range of use, are properly in the liberal and remedial spirit of workers' compensation legislation and perhaps should be present in the Manitoba Act as well.

B. SPECIFIC PRESUMPTIONS

Every time a workers' compensation act states that a certain result, fact or status "shall be presumed" or "shall be deemed," a presumption is created. Sometimes these are rebuttable presumptions but irrebuttable presumptions are not uncommon, especially among "deeming powers."

The numbers of such presumptions are legion; their existence in fact creates an appreciable part of the substantive law of workers' compensation. Interprovincial statutory comparisons of any one or any set of these presumptions would require a paper in its own right. Therefore, this paper will merely outline general categories of substantive presumptions.

One area rife with presumptions is the area concerning coverage of workers under the Act. Most Acts have a general provision empowering the Board to deem various types or classes of people to be "workers" under the Act. Most of these provisions are irrebuttable and so, in practical terms, are really definitional in nature.

Another popular area for presumptions is the financial area. Average earnings of certain types of workers are often deemed to be the equivalent of some amount worked out by a prescribed formula. For example, average earnings of volunteers and seasonal workers covered by the Act are frequently deemed in this manner.

Deaths occurring on the job are frequently subject to presumptions as well. For example, in Alberta there is a rebuttable presumption that a worker found dead on the jobsite is presumed to have died by accident arising out of and in the course of his employment.[35] The same provision in the Saskatchewan Act, however, appears to be irrebuttable.[36]

Sometimes death is presumed to have been caused by certain compensable conditions. For example, in Nova Scotia:

> s. 36(5) Where permanent total disability results in a paraplegic condition, there shall be a presumption that on the death of the claimant, death shall be considered, for compensation purposes, as arising from the compensable disability.[37]

B.C. has a similar provision for one specific type of industrial disease. Note as well that it is an irrebuttable presumption:

> s. 6(11) Where a deceased worker was, at the date of his death, under the age of 70 years and suffering from an industrial disease of a type that impairs the capacity of function of the lungs, and where the death was caused by some ailment or impairment of the lungs or heart of non-traumatic origin, it shall be conclusively presumed that the death resulted from the industrial disease.[38]

A lot of procedural matters are governed by presumptions (usually irrebuttable "deeming sections") such as service and receipt of notices, election and waiver, performance of duties by Commissioners of the Board, etc.

FOOTNOTES

1. John Sopinka and Sidney N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworth's, 1974), pp. 375–376.
2. *Id.*, p. 376.
3. *Id.*, p. 378.
4. *Ibid.*
5. *Id.*, p. 376.
6. *Id.*, pp. 376–377.
7. Terence G. Ison, *Workers' Compensation in Canada* (Toronto: Butterworth's, 1983), p. 118.
8. (1985), 9 O.A.C. 129 (Ont. Div. Ct.).
9. *Id.*, p. 139. [emphasis added] Note: at the Ontario Court of Appeal level, the appeal judges made no comment on this particular point.
10. R.S.N.B. 1973, Ch. W-13, as amended.
11. S.N. 1983, Ch. 48, as amended, s. 49.
12. R.S.B.C. 1979, Ch. 437, as amended.
13. R.S.M. 1970, Ch. W200, as amended, s. 4(5)
14. Workers' Compensation Board of B.C. *Rehabilitation Services and Claims Manual*, 1984, p. 3–4.
15. unreported. Sept. 19, 1986 (Ont. C.A.), reversing (1985), 9 O.A.C. 129 (Ont. Div. Ct.).
16. *Id.*, p. 16.
17. *Supra*, n. 14, p. 3–4. [emphasis added].
18. *Id.*, pp. 3–5 to 3–6.
19. (1967), 67 D.L.R. (2d) 726 (N.B.C.A.).
20. *Id.*, p. 733.
21. from Director of Claim Services to Adjudicating Staff, February 17, 1983.
22. Board Minutes, November 4, 1982, Item #8.
23. S.S. 1979, Ch. W-17.1, as amended, s. 29.
24. R.S.S. 1978, Ch. W-17, s. 31(6).
25. R.S.Q. Ch. A-3, as amended. [emphasis added].
26. *Id.*
27. *Supra*, n. 7, p. 32.
28. Manitoba Regulation 24/77.
29. *Supra*, n. 12.
30. R.S.O. 1980, Ch. 539, as amended.
31. *Supra*, n. 11, s. 48(1).
32. R.S.N.S. 1967, Ch. 343, as amended, s. 20.
33. R.S.P.E.I. 1974, Ch. W-10, as amended, s. 17.
34. *Brinton* v. *W.C.B. of Nfld. and Lab.* (1982), 38 Nfld. & P.E.I.R. 433 (Nfld. C.A.), reversing (1981), 30 Nfld. & P.E.I.R. 497; leave to appeal to S.C.C. denied (1983), 48 N.R. 160n.

    See also, to the same effect: *Hanney* v. *W.C.B. of B.C.* (1981), 33 B.C.L.R. 120 (B.C.S.C.).
35. R.S.A. 1980, Ch. W-16, as amended, s. 19(3).
36. *Supra*, n. 23, s. 30.
37. *Supra*, n. 32.
38. *Supra*, n. 12.

PREPARED FOR:	Worker's Compensation Legislative Review Committee
PREPARED BY:	Debra Hathaway
DATE:	January, 1987

SCHEDULE A

[WORKERS COMPENSATION BOARD]— MEMORANDUM ... TO ADJUDICATING STAFF

SUBJECT: *Claims Adjudication — Some Points to Consider*

February 17, 1983

The following is being presented as a guide to assist the adjudicator in making a determination as to the compensability of a claim. Its purpose is to keep in mind factors that may have to be considered and to point the adjudicator in the right direction.

Not all items may be relative to a particular case.

1. The claims adjudicator should identify the issue to be considered.
2. Prime consideration should be given to Section 4 (5) of the Act.

Where the accident *arises out of the employment*, unless the contrary is *proven*, it is presumed it occurred in the course of the employment; and where the accident occurs *in the course of the employment*, unless the contrary is *proven*, it is presumed that it arose out of the employment.

The statement "unless the contrary is proven," places upon the adjudicator the responsibility to obtain, consider and rationalize all the factors involved.

If it is evident that more information or some clarification is required before "the contrary is proven," then that information or clarification should be obtained. i.e. It *may not* be enough for a doctor to simply say the claimant's recurrent back trouble is related to a specific accident.

Depending on the information on the file, (if it is not obvious) the doctor may have to be asked on what basis he has made that determination.

A presumption that the disablement arose out of the employment arises in any case where the symptoms occurred in the course of employment or any symptoms indicating the onset of the condition occurred in the course of the employment.

Where the presumption applies, the adjudicator must consider and determine the following questions:

a) Is there an available hypothesis that the disability arose from one or more causes; none of which resulted from the employment?

b) If yes, what is the evidence to support the hypothesis?

c) What is the evidence to support employment causation?

In considering the above questions, the adjudicator should:

1) Review the existing documentation on file.

2) Consider what evidence might usefully be obtained by further inquiries.

3) Ask advice from the appropriate Board doctor on whether the file documentation is sufficiently complete to consider the above questions or whether there is any other type of inquiry or determination that might add further indicators to the cause of the disability.

4) Undertake or arrange for any further inquiries or examinations that may be appropriate.

5) Invite comments from the appropriate Board doctor on items b and c above.

The claim should then be considered and decided according to the following guidelines:

a) If the answer to question (a) is that there is no such hypothesis, the presumption applies and the claim must be allowed.

b) Where there is such an alternative hypothesis, the evidence and arguments should be considered by the adjudicator in relation to questions b and c, to determine which hypothesis is the more credible.

c) If the credibility of each hypothesis appears to be evenly balanced or if it cannot be determined which hypothesis is the more credible, the presumption applies and the claim must be allowed.

Where the presumption is not applicable.

If the onset of disability did not occur in the course of the employment and none of the symptoms indicate any onset of disability occurred in the course of employment, the presumption in Section 4(5) does not apply.

Where the presumption does not apply, the adjudicator must consider and determine the following questions.

a) Is there an available hypothesis that the disability arose from causes resulting from employment?

b) If yes, what is the evidence to support the hypothesis?

c) Is the evidence in support of the hypothesis independent of the employment situation?

In considering the above questions, the adjudicator should:

1) Review the existing documentation on file.

2) Consider what evidence might usefully be obtained by further inquiries

3) Ask advice from the appropriate Board doctor on whether the file documentation is

sufficiently complete to consider the above questions, or whether there is any other type of inquiry or examination that might add further indicators to the cause of disability.

4) Undertake or arrange for any further inquiries or examinations that may be appropriate.

5) Invite comments from the appropriate Board doctor on questions b and c above.

The claim should then be considered and decided according to the following guidelines:

a) If the answer to question (a) is that there is no such hypothesis, the claim must not be allowed.

b) Where there is such an alternative hypothesis, the evidence and arguments should be considered by the adjudicator in relation to questions b and c to determine which hypothesis is the more credible.

c) If the credibility of each hypothesis appears to be evenly balanced or if it cannot be determined which hypothesis is the more credible, then the claim must not be allowed.

1. When dealing with claims, the information should explain the sequence of events relative to the cause of the disease or condition.
2. There may be an alternate etiology or cause that can be identified.
3. If there is, then as stated each hypothesis has to be considered.
4. Never ask our doctor whether the condition is *a result of the specific accident*, that is the adjudicator's determination.

   The adjudicator could ask "Could ——— condition have resulted from ———".
5. Remember, the doctors should be considered as advisors only, to provide medical advice. They do not make the decision as to whether the case is acceptable.
6. As stated, the doctor can be asked how he sees the case in terms of diagnosis.
7. The adjudicator should bring to the attention of the doctor any medical/non-medical reasons that may influence the need for an examination.
8. If there is a difference of medical opinion, the adjudicator should look at a case from the point of view as to why there may be a difference of medical opinion.

   Medical opinion may be quite divergent on the same facts. This is not uncommon as medicine in many situations is not an exact science.

   The differences in medical opinion could be based on the personal experience or beliefs of the doctor and are quite legitimate.
9. The adjudicator must apply the legal aspects of the Act in order to solve the problem and this is the adjudicator's role.
10. If an adjudicator makes a decision, but cannot explain it with any degree of rationale, then the adjudicator was not in a position to have made the decision in the first place.

...

SCHEDULE B

WORKERS COMPENSATION ACT—Section 4(5)—Rule of Presumption

[MINUTES]

The Chairman of Review Committee was invited to discuss the amendments to this section with the Board because of concerns expressed by Review Comittee as to the intended interpretation and application.

The previous wording of the section providing for presumption unless the contrary was shown has been amended to focus the intent of this section by providing that the rule of presumption will apply unless the contrary is proven.

It is considered that this wording in the Act better identifies the intent of this section.

In practical terms, it is the opinion of the Board that where an opinion is presented negating the claim, it will be necessary that such opinion be supported by substantial fact. Where this cannot be provided in support of such opinion, then the section allows for the benefit of the doubt to be given to the worker.

The Chairman of Review Committee indicated that he was querying the application of this section, particularly as it applied to the provision of section 34.1(1) providing for compensation for pre-existing conditions. The Board of Commissioners discussed the intent of the legislature in providing for compensation where there is a relationship between an injury occurring at the workplace and a pre-existing or underlying condition.

The Chairperson will arrange for a meeting of the Board and members of the Review Committee to consider the application of Section 34.1(1).

Moved by [...], Seconded by [...].

THAT the meeting be recessed at 10:45 a.m., Thursday, November 4, 1982 to be reconvened at 9:00 a.m., Friday, November 5,1982.

APPENDIX D

THE LEGAL CONCEPT OF NATURAL JUSTICE

I. INTRODUCTION

Undoubtedly, a common complaint before you at the public hearings will be that the Workers Compensation Board generally or the Board of Commissioners specifically have treated claimants "unfairly," "unjustly," and have denied them "simple natural justice."

In accordance with the common lay usage of such terms, their speakers will be referring, in many cases, to the results of their respective claims; in other words, they disagree with the substantive decision ultimately rendered which, on the facts and merits of their claim, is felt to be unjust or unfair.

Such concerns are not within the purview or definition of the legal concept of Natural Justice. In law, "Natural Justice" has a very specific and limited ambit. It refers to, and is designed to ensure, procedural fairness only. Its purpose is to protect individuals from arbitrary and capricious use of power in the decision-making process itself; it is not a system whereby the justice or fairness of the content of the actual decision is either ensured or guaranteed.

Procedural Natural Justice is enforced by superior courts over inferior courts, boards and tribunals. No statute confers this power of procedural review upon superior courts, and no statute prescribes the definition of Natural Justice. Natural Justice is a common law concept; in other words, it is the creation of the judiciary, who have elaborated upon its content over many generations.

This situation should be contrasted to the appellate jurisdiction of the courts. Appellate jurisdiction is the power to re-decide a case on either its factual or legal merits, and to confirm or actually replace the substantive decision already reached by the inferior court, board or tribunal. A superior court has absolutely no appellate jurisdiction unless it is conferred by statute.

So, for example, the Court of Queen's Bench has no appellant jurisdiction over the Workers Compensation Board because *The Workers Compensation Act* does not provide for any appeal route to the court. The court therefore has no jurisdiction to decide whether compensation should or should not be given, or in what amount, or for what duration.

But the Court of Queen's Bench as a superior court does exercise supervisory jurisdiction over the inferior tribunal, the Workers Compensation Board, by virtue simply of the common law. But its supervisory jurisdiction is strictly limited to procedural review because otherwise, of course, it would constitute a back-door method of obtaining illegal appellate jurisdiction.

This difference between supervisory jurisdiction and appellate jurisdiction has a fundamentally important, practical result. If a superior court finds that an inferior court, board or tribunal has violated the principles of Natural Justice in the exercise of its discretion, the superior court cannot substitute its own, new decision on the merits of the particular case; it can only wipe out (or "quash") the old decision and send the matter back to the inferior body to be reheard. Thus, the substantive decision on the merits is always left in the hands of the inferior body where statute has decreed it should be. It is entirely possible that the inferior body, on the second hearing and this time following correctly the principles of Natural Justice, will again reach exactly the same substantive decision as in the original hearing. But procedural fairness will have been ensured, which is the only purpose for which the principles of Natural Justice have been designed.

If a just procedure produces an unjust result, it becomes a matter for appellate review and the government, which is supreme, may deny such jurisdiction to a court. But the logic of our judicial system dictates that no result, just or unjust, can stand unchallenged if produced by an unjust procedure. The procedure becomes a matter for judicial review and the judiciary jealously guards its self-generated jurisdiction from the supremacy of parliament.

Finally, by way of general introduction, the terminology surrounding the concept of Natural Justice is unique to this area of the law, and some brief definitions may not be amiss. When an applicant initiates a case of judicial review, s/he is said to be seeking "prerogative relief." The most common prerogative relief sought against an inferior tribunal is "certiorari"—i.e. a court order which quashes the lower body's decision and remits the matter for rehearing. An applicant can also seek "prohibition"—a court order which forbids the lower body from exercising its jurisdiction further until the breach of Natural Justice has been remedied; or "mandamus"—a court order which compels an inferior tribunal to exercise its jurisdiction when it has refused, failed, or neglected to do so.

II. CLASSIFICATION OF STATUTORY POWERS

The threshold question is: whose decision-making powers will the court review for compliance with Natural Justice? Obviously, if a court will not review a certain body's procedure then a person's right to Natural Justice is worthless, for it cannot be legally enforced.

The inferior body must be an entity which exercises public, statutory jurisdiction.[1] The body must exercise executive power—i.e. the implementation and enforcement of laws and statutes. Such executive functions are classifiable into three types of subordinate powers:

a) legislative power (to pass regulations, by-laws, rules, etc.);

b) administrative power (decision-making which is policy oriented and characterized by the presence of very broad discretion);

c) quasi-judicial power (decision-making which affects private rights of specific citizens so that the body is placed under a duty to exercise its discretion using semi-judicial methods and criteria).

Classification of the statutory powers of the inferior tribunal was once critical, for historically, Canadian superior courts would grant judicial review only of those inferior bodies exercising judicial or quasi-judicial powers. Any body exercising administrative power (e.g. a prison disciplinary committee) or legislative power was completely immune from judicial review. Only quasi-judicial powers attracted the duty to observe Natural Justice. Courts often went through tortuous mental gymnastics in order to slot a tribunal into the classification which would produce the end result desired.

This situation changed in the late 1970's when the Supreme Court of Canada extended the availability of judicial review to purely administrative bodies as well.[2] For the first time, it was posited that a Duty of Fairness is attached to the procedural exercise of an administrative power, even if full-blown Natural Justice be not required.

This development had the effect of lessening the importance of classification of powers as a threshold question, although it will remain important for so long as there is perceived to be a difference in the content of Natural Justice and the Duty of Fairness. (More on this controversy later.)

Workers Compensation Boards, incidentally, are generally conceded to be exercising quasi-judicial functions, at least at the level of final appeal to the Board of Commissioners. One would not seek prerogative relief from the decision of anyone less than the Board of Commissioners because of the principle that a court will not grant prerogative relief until the applicant has exhausted the appeal procedure provided by the statute. If a claims adjudicator or review committee breaches a principle of Natural Justice or the Duty of Fairness, but the Board of Commissioners does not, the decision of the Board will be said to "cure" all prior defects in procedure, so that a claimant could not rely on such breaches to seek prerogative relief in order to bypass the Board's decision and obtain, so to speak, a second kick at the cat.

III. NATURAL JUSTICE

There is no fixed definition of Natural Justice. It is a rather fluid concept. As stated by Lord Parker, in the British case *Ex parte A Building Society*:

> I would like to say at once that I always find the expression "natural justice" very difficult. There is no one code of natural justice which is automatically imported into any procedure of a judicial nature. What is imported by way of natural justice depends entirely on the tribunal or official in question, the nature of his functions, and, perhaps most important of all, the exact words of the statute, because Parliament may, by suitable words, provide for a procedure which conflicts in many respects with the concepts of natural justice which one would find adopted by the courts. Each case must depend upon the nature of the function and the exact words of the statute.[3]

Courts have, over the years, laid down basic guidelines as to what types of procedures are required to serve Natural Justice. The list should not be taken as exhaustive, for the common law is never fixed but always subject to expansion.

There are two basic principles of Natural Justice; known by and summed up by their latin rubrics:

A. Audi alteram partem

B. Nemo judex in causa sua

A. Audi Alteram Partem

The rules or rights subsumed under this principle of Natural Justice have, as their focus, the nature of the procedure or process by which the decision is achieved.

1) Notice

It is fundamental that reasonable and adequate notice of the proceedings must be given to all parties interested in the outcome ("interested" of course in the sense of having something to lose or to gain).

The notice requirement may, in certain circumstances, be met by posting in a public place or publishing in a newspaper the notice containing details as to time, place, and purpose of the hearing. Where, however, specific parties are interested, or known to be opposed, notice should be direct and given within a sufficient time so that the party affected may prepare his/her case. Notice must always be clear, definite and unambiguous. If discipline or other adverse effect is contemplated as a possible outcome of the hearing, the notice must also specify the grounds upon which such a result is sought.[4]

2) The Right to be Heard

What kind of hearing is the person involved entitled to? The law is clear that it need not be an oral hearing; a hearing based on written submissions alone will satisfy Natural Justice. This is often where the statute governing the tribunal will settle the question, for many statutes specify whether a hearing is to be oral or not.

Regardless of the superficial form of the hearing, Natural Justice dictates that each party must have the right to be heard. The entitiy must act in good faith and listen fairly to both, or all, sides. It must always give the parties the opportunity to contradict prejudicial evidence.[5] Issues grouped around the right to be heard and to make full answer and defence have settled into the following broad categories:

i) Ex Parte Evidence

A tribunal is not entitled to hear evidence in the absence of (or "ex parte") one of the parties involved, for this procedure deprives the party of a fair opportunity to correct or contradict evidence. So, for example, a tribunal may not hold private interviews with witnesses.[6] Nor may a tribunal, once the hearing is over, seek the opinion of its outside legal counsel unless the applicant is advised of same and given a chance to respond and comment on the legal opinion so obtained.[7]

ii) Access to Information

This is always a hot issue in Natural Justice, particularly if the applicant demands access to confidential information (e.g. competitors' business data, internal organization memos, etc.). There must be a balance between confidentiality, the individual's right to be able to present a full case, and the tribunal's obligation to provide a meaningful hearing. Caselaw goes in all directions on this issue and perhaps the most that can be said is that the extent of disclosure required in any particular case depends on the circumstances.

A recent case in the workers' compensation field settled the important question of file disclosure to claimants in this area. The British Columbia Court of Appeal, in *Re Napoli and Workers Compensation Board*,[8] held that it is a breach of Natural Justice for the Board to deny an appealing claimant the right to copy the full contents of his/her Workers Compensation Board file, including all medical reports. The practice of providing a mere summary of the file's information robs the claimant of the ability to know the full case against him/her and to make a full and effective answer thereto.

In the wake of this case, the *Manitoba Workers Compensation Act* was amended and some access rights are now statutorily ensured (sections 52.2 and 52.3)

iii) Rules of Evidence and Open Court

It is generally held that, unless the governing statute provides otherwise, a tribunal need not adhere to the strict rules of evidence as practiced in superior courts nor need the hearing generally be open to the public.

iv) The Right to Counsel

Natural Justice does not dictate that a person always has the right to be represented by a lawyer. If the governing legislation is silent on this issue, then it is the circumstances of the case which, as usual, will define the content of Natural Justice.

Generally speaking, it is easier to show that Natural Justice requires the right to counsel where the hearing is oral and where the purpose of the hearing is to penalize or discipline a person. The more serious the consequences of the penalty, the more likely it is that one should have counsel under the rules of Natural Justice. The leading case in this area is *Pett* v. *Greyhound Racing Association*,[9] a British case where a dog racer was being disciplined by the Association on the charge of drugging dogs. If proven, the man stood to lose his licence and hence, his livelihood. The English Court of Appeal stated that where reputation and livelihood are in issue, the individual has the right to an oral hearing at which s/he can appear with an agent, who of course may be a lawyer if so desired.

Some bodies which regularly discipline members, such as police departments, try to get around this requirement of Natural Justice by having internal rules forbidding representation by lawyers. If such rules take the form of Regulations enacted pursuant to statute, the courts will respect them and give them effect because of parliamentary supremacy,[10] but if such rules are purely internal and cannot be accorded Regulation status, then the courts will usually strike them down as violations of Natural Justice.[11]

v) The Right to Cross-examine

This is not an automatic requirement of Natural Justice but, like all else, may be a requirement depending on the circumstances. Cross-examination goes to the issue of the individual's right to question, contradict and rebut the evidence against him/her. In the context of an oral hearing, with relatively complex procedure, cross-examination has been held to be a requirement of Natural Justice where it would serve to help prove the cross-examiner's case and not merely just destroy the opposition's case.[12]

B. Nemo Judex in Causa Sua

The rules or rights subsumed under this principle of Natural Justice have, as their focus, the issue of the impartiality of the decision-makers.

The latin phrase means, literally, "no one may be a judge in his own cause." If a decision-maker has a pecuniary interest in the case, Natural Justice dictates that there is an irrebuttable presumption of bias. It matters not how small the pecuniary interest be. So, for example, where two members of a Municipal Council were shareholders in a company applying to the Council for a permit to build a curling rink, the decision was struck down by a court for bias, even though there were four other Council members who were not shareholders and the decision to grant the permit had been unanimous.[13]

Natural Justice will also strike down decisions in which there is a reasonable apprehension that the decision-maker has a personal bias (as opposed to a pecuniary interest). A reasonable apprehension of personal bias may be raised by circumstances such as:

— where the decision-maker's spouse or other relative has a pecuniary interest;[14]

— where the decision-maker demonstrates undue friendship or enmity to one of the parties or counsel;[15]

— where the decision-maker has indicated a predisposition to decide the case in a certain way.[16]

One of the most striking features of this principle of Natural Justice is that there is **never** a need to prove **actual** bias. If the decision-maker has a pecuniary interest, an irrebuttable presumption of bias automatically follows. If personal bias is alleged, one need only show that it is reasonably apprehended—i.e. a reasonable person would have a suspicion of likely partisanship on the part of the decision-maker. The irrelevancy of the presence or absence of actual bias is a result of the legal maxim or principle that justice must not only be done, it must be seen to be done.

IV. DUTY OF FAIRNESS

As stated earlier, it was not until the late 1970's that the Supreme Court of Canada extended judicial review to purely administrative functions. (Common examples of decision-makers who exercise purely administrative functions include prison discipline boards, parole boards, many kinds of employment hiring or discipline committees, and many kinds of licensing boards, immigration and deportation boards, etc.)

The principles of procedural fairness attaching to administrative functions were summed up in the vague phrase "Duty of Fairness."

What is the content of the Duty of Fairness? The answer is still evolving. The courts have only been grappling with the question for six years and the evolution of common law is hardly noted for speed.

At first, it was thought that the Duty of Fairness is a new, separate and different procedural standard than Natural Justice. This view requires that the preliminary classification of functions is still necessary and, indeed, crucial, for the principles of Natural Justice can still only be applied to quasi-judicial functions, and the Duty of Fairness can only be applied to administrative functions. The two separate standards of procedure must not be mixed up by sloppy classifications.

Then, very recently, a new view emerged: Natural Justice and the Duty of Fairness are not different or mutually-exclusive; "they simply describe different contents of the same duty to be fair, which applies to all decision-makers but varies in its application according to the particular circumstances."[17]

This view is fueled by the so-called "spectrum approach" to classification advocated by the current Chief Justice of Canada, Brian Dickson.[18] This view of classification says that there is no clear-cut, black-and-white dividing line between an administrative function and a quasi-judicial function; rather, there is a sliding scale or spectrum of variables which, depending on those present or not, will tip the scales one way or another in a very general way. The beauty of this approach is that it is flexible and provides a greater awareness of individual circumstances.

The spectrum approach, applied to the Natural Justice versus Duty of Fairness controversy, removes the dichotomy between the two and holds that, instead:

> ...there is no need to classify functions before applying either the...[principles of Natural Justice]...or the doctrine of fairness. Instead, decision-making involves a basic duty to be fair, the content of which varies according to the nature of the decision-making body, the power being exercised and the consequences of the decision.[19]

In other words, the two are merely components of the same duty of procedural fairness attached to all decision-making.[20] Natural Justice represents the highest end of the spectrum and the Duty of Fairness represents the lower. The precise standard of procedural fairness which may suit one tribunal may not fit another, although both technically may be exercising the same broad kind of powers under the old classification scheme.

The courts have not yet definitively chosen between the two views of the relationship between Natural Justice and the Duty of Fairness. The trend, however, seems to be leaning toward the eventual triumph of the spectrum approach.[21]

Turning again to the question of what is the specific content or rules of the Duty of Fairness, the easiest definition is that it is diluted Natural Justice. The same kinds of principles are to be found but in a much more qualified way: the right to adequate and reasonable notice (sometimes), the right to be heard (although rarely in an oral setting), the right to be informed of all the evidence (but in a summarized way and without as many particulars), the right to counsel (rarely), the right to cross-examine (very rarely).

One of the main sources of caselaw defining the Duty of Fairness is in the prison and parole context, and it is in this context as well that one can see the somewhat remarkable gains in procedural fairness made over the past six years.

Before 1979, no court would review any prison or parole decision for procedural fairness. Prisoners and parolees had no recourse against even the most blatant arbitrariness or bias on the part of decision-makers and were literally at the mercy of "the system."

When the Supreme Court of Canada extended judicial review to administrative bodies, it was carefully and clearly stated that the Duty of Fairness was modified by the requirements of fast retributive action to maintain prison discipline. Urgency of a situation would always justify denuding a decision of procedural obligations.

So, for example, this requirement alone could obviate the need for notice or any other trapping of procedural fairness, as in *Re Morin*[22] where an inmate who was an immediate danger to the security of an institution was summarily transferred from a provincial jail to a federal penitentiary. But once the urgency has subsided, some courts now say the obligation to provide procedural fairness revives and the decision should be reviewed after the fact, allowing the prisoner to respond to factual allegations and to provide his/her own information and views.[23]

Where there is no incarcerated prisoner involved, like in a parole hearing or an employment disciplinary situation, the notice requirement is usually very close, if not identical, to that of Natural Justice.

Access to information is an expanding area. However, the Duty of Fairness appears to be largely satisfied by summaries of evidence rather than access to the actual reports themselves. This is especially so in the prison and parole context,[24] although a very recent parole case from Manitoba held that, for a day parole hearing to be fair, the prisoner must have access to all information in his/her confidential security file unless the release of the confidential information **automatically** leads to the discovery of the informant's identity.[25]

In the context of a university promotions hearing, a British Columbia court has held that the teacher concerned must be provided with the actual reports and letters of reference upon which the denial of promotion was based,[26] while an Ontario court has said the Duty of Fairness is satisfied by providing the teacher with the "substance" of student grievances against him upon which the denial of promotion was based.[27]

Oral hearings, the right to counsel, and the right to cross-examination are still procedures not usually dictated by the Duty of Fairness, especially in the prison context.[28] But the Duty of Fairness does provide for oral hearings and the right to counsel at parole hearings.[29] The different contents of the Duty of Fairness is probably a reflection of the differences in the consequences of prison discipline hearings and parole hearings; in the latter, the actual liberty of the prisoner is at stake.

Oral hearings and the right to counsel are more likely to be required for employment promotion or discipline situations.

In the Nemo Judex area, it has recently been confirmed that the Duty of Fairness does include principles concerning bias. However, as in the case of Audi Alteram Partem violations, a sliding scale or spectrum approach seemingly applies, so that the Duty of Fairness standard for judicial review of bias may be less rigorous for administrative bodies who do not make final decisions, but only hold hearings for the purpose of producing a report.[30]

V. PRIVATIVE CLAUSES

As stated earlier, the concept of judicial review is a common law, or "judge-made," principle and the judiciary jealously guards its self-generated jurisdiction from legislative attempts to remove it.

Legislatures go to great lengths to keep court interference out of their quasi-judicial and administrative schemes. Most governing statutes contain a privative clause for this purpose.

Privative clauses take many forms. An example of one of the most comprehensive privative clauses is found in section 51(1) of the Manitoba *Workers Compensation Act*:

> 51(1) The board has exclusive jurisdiction to examine into, hear, and determine, all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority, or discretion, is conferred upon the board; and the action or decision of the board thereon is final and conclusive and is not open to question or review in any court; ***and no proceedings by or before the board shall be restrained by injunction, prohibition, or other process or proceeding in any court, or are removable by certiorari or otherwise into any court.***
> [Emphasis added]

The emphasized portion, read literally, makes it abundantly clear that the intent of the legislature is to prevent judicial review for breaches of Natural Justice.

Superior Courts have two views as to how privative clauses should be read:

1. The "Limited View":

This is the traditional approach to such clauses. The Supreme Court of Canada has said that privative clauses do not really mean what they literally say; one must assume that Parliament is reasonable and did not intend to confer unbridled power upon inferior tribunals by freeing them from the traditional restraint of review by the courts. This being so, privative clauses are not to be read literally, but figuratively.[31]

This has been the approach used in Manitoba by our Court of Appeal to get around the aforementioned comprehensive privative clause in our *Workers Compensation Act*.[32]

2. The "Literal View":

The Supreme Court of Canada is not above contradicting itself, although judicial tradition forbids an outright admission of error. It has on occasion read privative clauses literally and accepted the supremacy of Parliament to oust judicial review.[33] Some courts, in certain circumstances, began to pay new respect to privative clauses.

The two views live side by side and illustrate nothing so much as the fact that:

> ...it may justly be urged that the recognition of exclusive jurisdiction by the courts is less a matter of the words used in a statute than the attitudes that the courts bring to their interpretation... There is much to support the view, therefore, that the real question with respect to the effectiveness of any privative clause is the court's readiness to accept it.... Mere words will not succeed against attitudes that are ingrained; the attitudes prevail. This might, perhaps, explain the disturbing differences in the courts reading of these clauses in respect of different types of tribunals. There is a definite pattern of acceptance of the literal words of privative clauses in relation to workmen's compensation boards, and a definite pattern to the contrary in relation to labour relations boards.[34]

3. A New Approach:

The Supreme Court of Canada has recently taken a new turn in the ongoing battle against privative clauses. In what has been rather colourfully described as a "judicial panzer attack, a virtual constitutional blitzkrieg,"[35] the Supreme Court held that provincial legislatures do not have the constitutional power to exclude judicial review of their administrative tribunals and boards.[36]

The reasoning is as follows. When privative clauses are read literally, judicial review is excluded. An inability to be judicially reviewed is a feature of superior courts only. Therefore, privative clauses, in effect, turn a lowly tribunal into a superior court, whose members are provincially appointed. But only the federal government can appoint superior court judges according to section 96 of the *Constitution Act, 1867*. It follows, therefore, that a provincially-appointed "superior court" is unconstitutional. The Supreme Court has put the provinces on notice that it will unhesitatingly strike down privative clauses on this basis.

VI. THE CHARTER OF RIGHTS

Because the principles of Natural Justice and the Duty of Fairness are common law principles, they may be changed at any time by statute, because of the principle of the Supremacy of Parliament. So, for example, although Natural Justice might require a hearing to be held in a quasi-judicial matter, a statute could remove this right with impunity.

For this reason, courts never apply the principles of Natural Justice without scrutinizing very closely the legislation governing the tribunal it is reviewing.

The entrenchment of the Charter of Rights may change this subservience of Natural Justice to the supremacy of parliament, at least in some situations.

Section 7 of the Charter reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the ***principles of fundamental justice.***
> [Emphasis added]

Should the phrase "principles of fundamental justice" refer (at the very least) to what is known now as the principles of Natural Justice and the Duty of Fairness (as some courts have already declared),[37] the effect of section 7 is to entrench procedural fairness so that mere statutes cannot remove it from any quasi-judicial or administrative procedures.

This result has in fact been achieved already by a couple of lower courts who, in effect, ignored provisions of the Parole Regulations which violate the Duty of Fairness.[38] Prior to the Charter, these courts would have been bound to apply those same Parole Regulations because of the supremacy of parliament.

Of course, entrenchment would hold true only for those situations dealing with issues of "life, liberty and security of the person." The full extent of this phrase is not yet settled, although clearly, prison and parole issues fall within its ambit.

It was section 7 and specifically the phrase "security of the person" which has been used to attack Workers Compensation Acts in various provinces. No court yet has accepted the argument that the statutory removal of the right to sue the employer is unconstitutional as a violation of "security of the person."[39] This being the case, it would appear likely that (for the moment) provincial legislatures could still override by statute the principles of Natural Justice insofar as workers compensation is concerned.

It should always be borne in mind that the Charter, in any event, has a "weasel clause"; rights are guaranteed "subject...to such reasonable limits as can be demonstrably justified in a free and democratic society," (section 1) which may be used by the courts to restrain the Charter's effect.

FOOTNOTES

1. *Rex* v. *Electricity Commissioners*, [1924] 1 K.B. 171; *Re McComb and Vancouver Real Estate Board* (1960), 32 W.W.R. 385.
2. *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau* v. *Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602.
3. [1960] 1 W.L.R. 669, at 676.
4. *Forest* v. *La Caisse Populaire de Saint-Boniface* (1962), 37 D.L.R. (2d) 440 (Man. C.A.).
5. *Board of Education* v. *Rice*, [1911] A.C. 179 (H.L.).
6. *Kane* v. *Board of Governors of University of British Columbia* (1980), 31 N.R. 214 (S.C.C.).
7. *Re Becker and Workers Compensation Board* (1983), 42 O.R. (2d) 11 (Ont Div. Ct.).
8. (1981), 126 D.L.R. (3d) 179.
9. [1968] 2 W.L.R. 1471.
10. *Maynard* v. *Osmond*, [1976] 3. W.L.R. 711 (Eng. C.A.).
11. *Re Bachinsky* (1974), 43 D.L.R. (3d) 96 (Alta. S.C.).
12. *Toronto Newspaper Guild* v. *Globe Printing*, [1953] 2 S.C.R. 18 (S.C.C.).
13. *Beer* v. *Fort Garry* (1958), 26 W.W.R. 702 (Man. C.A.).
14. *Convent of the Sacred Heart* v. *Armstrong's Point Association* (1961), 29 D.L.R. (2d) 373 (Man. C.A.).
15. *Ex parte Robbins*, [1971] 1 O.R. 42.
16. *McGavin Toastmaster Ltd.* v. *Powolowski*, [1973] 5 W.W.R. 388 (Man. C.A.).
17. Mercer, Peter P., "Recent Developments in Canadian Law: Administrative Law II" (1984), 16 Ottawa Law Review, pp.645-684 at p.669.
18. in *M.N.R.* v. *Coopers and Lybrand*, [1979] 1 S.C.R. 495 and *Martineau* v. *Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602.
19. *Supra*, n.17 at p.670.
20. However, courts still will not review purely legislative decisions (e.g. cabinet decisions): *Inuit Tapirisat* v. *A.-G. (Can.)* (1980), 33 N.R. 304 (S.C.C.).
21. Mullan, David J., "Developments in Administrative Law: The 1983-84 Term" (1985), 7 Supreme Court Law Review, pp.1–61 at p.57.
22. (1982), 70 C.C.C. (2d) 230 (Sask. C.A.).
23. *Swan* v. *A.-G. (B.C.)* (1983), 7 C.C.C. (3d) 130 (B.C.S.C.).
24. *Re Chester* (1984), 40 C.R. (3d) 146 (Ont. S.C.); *Greenberg* v. *National Parole Board* (1983), 48 N.R. 310 (Fed. C.A.).
25. *Wilson* v. *National Parole Board* (1985), 44 C.R. (3d) 30 (Fed. T.D.).
26. *Re Wong and Roberts* (1983), 147 D.L.R. (3d) 375 (B.C.S.C.).
27. *Re Bennett and Wilfred Laurier University* (1984), 48 O.R. (2d) 122 (Ont. C.A.).
28. Manson, Allan, "Administrative Law Developments in the Prison and Parole Contexts" (1984), 5 Admin. L.R. pp.150–164 at p.160.
29. *Id.*, at p.155.
30. *Bisaillon* v. *Keable* (1983), 2 D.L.R. (4th) 193 (S.C.C.)
31. *Re Toronto Newspaper Guild and Globe Printing Co.*, [1953] 2 S.C.R. 18 (S.C.C.); *Jarvis* v. *Associated Medical Services Ltd.* , [1964] S.C.R. 497 (S.C.C.).
32. *C.N.R.* v. *Wilson*, [1918] 3 W.W.R. 730 (Man. C.A.); *In re the Workmen's Compensation Act*, [1950] 1 W.W.R. 673 (Man. C.A.).
33. *La Commission des Relations Ouvrieres de la Province de Quebec* v. *Burlington Mills Hosiery of Canada Ltd.*, [1964] S.C.R. 342 (S.C.C.).
34. Reid, Robert F. and David, Hillel, *Administrative Law and Practice*, (2nd ed.) (Toronto: Butterworth's, 1978), pp.198,199,203.
35. Arthurs, H. W., "Protection against Judicial Review" (1983), 43 Revue du Barreau, pp.277–290 at p.281.
36. *Crevier* v. *A.-G. (Que.)* (1982), 127 D.L.R. (3d) 1 (S.C.C.).
37. *Wilson* v. *National Parole Board*, *supra*, n.25.
38. *Re Mason and the Queen* (1983), 7 C.C.C. (3d) 426 (Ont. H.C.J.); *Latham* v. *Solicitor-General of Canada* (1984), 12 C.C.C. (3d) 9 (Fed T.D.).
39. *Re Terzian* (1983), 148 D.L.R. (3d) 380 (Ont. Div. Ct.); *Re Ryan* (1984), 6 O.A.C. 33 (Ont. Div. Ct.); *Re Budge* (1984), 28 A.C.W.S. (2d) 478 (Alta. Q.B.).

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APPENDIX E

PRE-EXISTING CONDITIONS: PROVINCIAL STATUTES AND POLICIES

I. INTRODUCTION

When considering the problem of an industrial injury or disease superimposed on a pre-existing condition which is not itself industrial in origin, it is important to distinguish between the two "basic" kinds of pre-existing conditions and the three "basic" kinds of fact situations to which they give rise:

A. "STATIC" PRE-EXISTING CONDITION

This is where the worker has some inherent limitation, weakness or vulnerability, which renders the effects of an industrial accident more severe in his/her particular case or gives rise to unforeseen or unusual complications in the healing process or simply combines with some otherwise innocuous occupational factor to produce a disability. The crucial feature of a static pre-existing condition is that, prior to the industrial accident, it has no disabling effect in an ongoing or active sense.

By way of example, as Ison states in *Workers' Compensation in Canada*,

> [the worker] may have had a natural deformity or a weakness that made him vulnerable to injury, or a latent disease, or a degenerative condition the progress of which was so slow that, in the ordinary course of things, it would have had no disabling effect until after retirement.[1]

B. "DETERIORATING" PRE-EXISTING CONDITION

This is where the pre-existing condition already has, or is on the verge of having, an actively disabling effect prior to the occurrence of the industrial accident. Deteriorating pre-existing conditions combine with industrial injuries in one of two distinct factual ways:

(1.) *NO PERMANENT AGGRAVATION*: where the industrial injury does not worsen or aggravate the deteriorating pre-existing condition at all, so that any permanent residual disability remaining after the effects of the industrial injury have healed can be medically attributed solely to the pre-existing condition.

(2.) *PERMANENT AGGRAVATION*: where the industrial injury does worsen or aggravate the deteriorating pre-existing condition on a permanent basis. Aggravation (or enhancement) can be constituted not only by an actual worsening of the physical symptoms of the pre-existing condition but also by a premature inducement of the otherwise standard symptoms themselves.

Bearing these three distinct fact situations in mind assists in conceptually differentiating between the various legal and compensatory consequences which flow from the interaction of industrial injuries and pre-existing conditions.

It goes without saying that it is one thing to have nice, clear-cut categories for conceptual and analytical purposes, and quite another to adjudicate factually within which category a given, individual claim will fit. Medical and legal (or statutory) conclusions as to cause-and-effect may be reached by quite different criteria and are not necessarily identical. Legal adjudicators of compensation claims must have regard not only to "facts" as doctors may see them, but must weigh those facts within a framework of legal presumptions and standards of proof.

So while this paper will examine the statutory provisions and stated policies of the various provincial Workers Compensation Boards, there is no way to tell from these whether the policies are, in practice, being applied correctly. While an erroneous policy will of necessity produce erroneous results, the corollory does not necessarily hold true.

II. PRE-EXISTING CONDITIONS AT COMMON LAW

When dealing with the common law governing recovery of damages for personal injury, it is crucial to distinguish conceptually between two prerequisites to recovery: causation *in fact*, and causation *in law*.

Causation in fact concerns the issue of whether there objectively exists a factual causal relationship between the wrongful act and the harm suffered by the victim. Would the harm have occurred "but for" the wrongful act? If the wrongful act did not in fact cause the harm, then obviously the wrongdoer cannot, in all justice, be forced to pay damages to compensate for it.

Once causation in fact is proven and established, then a further prerequisite to recovery must be satisfied: was there causation in law between the wrongful act and the harm which it factually caused? For reasons of social policy, a wrongdoer will not be held liable for every single result which may factually flow from his/her wrongful act. Causation in law addresses the issue for how many and for what kind of consequences caused by a wrongful act should the wrongdoer be held accountable and be made to pay damages? This is conceded to be one of the most perplexing and convoluted areas in the law of personal injury but the rule is, generally speaking, that the harm which flows from a wrongful act must be reasonably foreseeable in some respect or other in order to be compensated. Controversy rages from time to time over the degree of reasonable foreseeability required (must the exact injury in all its specific detail be foreseeable? Is it sufficient that the general category of injury be foreseeable, as in "burns versus broken bones"? Or is it even sufficient that merely "some" type of injury be foreseeable?).

Problems arise, as may be expected, where the victim has a pre-existing condition, because it renders the degree of harm almost completely unforeseeable. For example, it is reasonably foreseeable that if you unintentionally but negligently happen to bump someone in the nose, he will likely get a nosebleed, miss very little, if any, time off work, and at most perhaps suffer a broken nose. But it is not reasonably foreseeable that he will die of it. Yet if the victim just happens to have a pre-existing condition of hemophilia, is it fair that his estate and family should be deprived of full damages because of the non-existence of causation in law? On the other hand, what of the hapless tortfeasor, especially one without insurance?

The resultant policy decision allocating loss in situations such as these is, of course, the well-known "Thin Skull Rule." Summed up by the maxim "a tortfeasor takes his victim as he finds him," the Thin Skull Rule in effect restricts the requirement of causation in law (foreseeability), and places liability for unforeseeable harm squarely on the tortfeasor's shoulders where the victim has an abnormal susceptibility to injury or aggravated injury because of a pre-existing condition.

While the Thin Skull Rule restricts the necessity of causation in law it does not remove it altogether. If absolutely no harm whatsoever is reasonably foreseeable as likely to occur to an ordinary person, the Thin Skull Rule cannot create liability where none would otherwise exist. So, in other words, if some of the injury was reasonably foreseeable (e.g. a bloody nose), then the Thin Skull Rule extends liability for the *full extent* of the unforeseeable harm (e.g. bleeding to death) as well.

When using the Thin Skull Rule, it does not make any difference whether the injury is just more severe than expected or actually entails wholly unexpected and unforeseeable consequences. Thus, for example:

> when a burn was the reasonably foreseeable type of injury, responsibility extended also to a fatal cancer which developed from an unusual premalignant condition of the victim; similarly, when a minor laceration calling for an anti-tetanus injection led to encephalitis because of the plaintiff's rare allergy to the vaccine.
>
> Indeed, as with an egg-shell skull, so with an egg-shell personality: e.g. a predisposed neurosis that flares up after the accident: perhaps even one that ends in suicide.[2]

It will be noted that the Thin Skull Rule works to foster recovery of damages in the "static pre-existing condition" category and in the "aggravated deteriorating pre-existing condition" category. Where there is no permanent aggravation of a deteriorating pre-existing condition, the claim would be denied on the basis of lack of causation in fact and the question of causation in law would thus never even arise.

The basis for calculation of the actual amount (or "quantum") of damages varies between cases involving static pre-existing condition and those involving aggravated deteriorating pre-existing conditions. Where static pre-existing conditions are involved, the whole of the residual disability is compensated as a consequence of the wrongful act, because no actual disability was present prior to it. But where the victim already had a deteriorating pre-existing condition, the quantum of damage will not compensate him/her for the degree of disability which existed prior to the wrongful act or, putting it another way, that portion of the residual disability which would have been present even if the wrongful act had never occurred.

> This follows from an application of basic principle: the measure of damages is the difference between the plaintiff's present and future anticipated condition due to the accident, and what would have been his plight *but for* it. The latter determination always involves an element of conjecture. In the case of the unusually susceptible plaintiff, it must be determined what were the possibilities that the susceptibility would in any event have been triggered into illness or disability absent the accident.[3]

As has been noted, in masterful understatement, "[c]ases of this kind often involve uncertainties of fact (where precisely to draw the line) and medical evidence is likely to be obscure and conflicting."[4]

It must be stressed that this concept of damages covers as well the degree or extent to which the deteriorating pre-existing condition has itself been accelerated, aggravated or enhanced. This is properly regarded as harm which flowed from the wrongful act; conceptually, it is not a "windfall" for the victim because s/he was "lucky enough" to have a deteriorating pre-existing condition.

III. PRE-EXISTING CONDITIONS AND WORKERS' COMPENSATION: GENERAL INTRODUCTION

Statutory provisions which deal specifically with the problem of pre-existing conditions are relatively recent additions to provincial Workers' Compensation Acts. In the absence of a specific provision, common law concepts govern.

The seminal Canadian case dealing with pre-existing conditions is *Hewitson* v. *Robin Hood Mills Ltd.*,[5] a 1923 decision of the Saskatchewan Court of Appeal. Hewitson, a returned soldier, had a static pre-existing condition which predisposed him to suffering back injuries. During the course of his employment, he suffered a permanent back injury when lifting a gangway preparatory to loading a railway car with flour.

The employer argued, firstly, that the predisposition to injury prevented this case from being an "accident" within the meaning of the statute because the injury would not have occurred but for the pre-existing condition. The incident itself was not inherently injurious; an ordinary worker who was not predisposed to injury would have suffered none.

Relying on the highest British court authority dealing with the point, the Saskatchewan Court of Appeal quickly squelched this argument. The employment need not be the sole cause or reason for the injury; it is sufficient if it be a contributing cause.

(To digress briefly, it is interesting to note that the employer's argument is logical, but it is a logic bound to the concept of fault. Using the terminology of the common law governing personal injuries, the employer is really arguing that, although there may be causation in fact, there is no causation in law. Because not even some of the injury was reasonably foreseeable, the Thin Skull Rule could not operate here. But once the concept of fault is removed as a compensation criteria, the objective foreseeability by the *wrongdoer* of the likelihood of injury becomes irrelevant and the focus of attention becomes, quite rightly, one of pure causation in fact.)

The next issue which arose was whether the monetary compensation to which Hewitson was entitled should be reduced (or apportioned) to take into account the contribution of the static pre-existing condition. The Saskatchewan Court of Appeal decided that, in the absence of statutory provisions on this issue, the compensation must be assessed "according to the principles applicable in ordinary accidents for damages for personal injury."[6] In other words, the ordinary principle of the Thin Skull Rule applies and the worker is entitled to full compensation.

Thus, unless the governing statute provides otherwise, workers' compensation schemes will be responsible for compensating the full extent of industrial injuries according to common law principles, wherein a static pre-existing condition or an aggravated deteriorating pre-existing condition is involved. And, just as at common law, where the industrial accident does not aggravate or worsen a deteriorating pre-existing condition, there would be no recovery for the extended disability since there is no relationship of factual causation.[7]

The trend today is for provincial workers' compensation statutes not to be silent on this point, but to have what is termed "proportionate entitlement" sections. Although wording varies between jurisdictions, the effect of these provisions appear to be to codify the common law principles within the statute. If the statutes and the Board policies which interpret them are correctly applied, the compensatory results should be roughly the same for the different categories of pre-existing conditions as the results obtainable under common law principles and the Thin Skull Rule.

However, problems arise both in understanding and applying this concept of proportionate entitlement:

> Occasionally the Boards mistakenly interpret this mandate to totally deny compensation when they feel that the disability claimed is far greater than would normally be expected from the type of accident suffered. In effect, the Board may try to say that the pre-existing condition which caused some disability before an accident, is now causing all the disability following the accident....[The mistake is to] confuse a pre-existing condition which should at most... [reduce] compensation with a pre-existing condition that may have caused all the subsequent permanent disability.[8]

IV. JURISDICTIONAL STATUTORY PROVISIONS AND POLICIES

A. SILENT STATUTES

1. NEWFOUNDLAND

Newfoundland's *The Workers Compensation Act*[9] is silent on the issue of pre-existing (non-compensable) conditions. This being the case, the principles stated in *Hewitson* v. *Robin Hood Mills Ltd.* would be directly applicable.

The policy of the Workers' Compensation Commission of Newfoundland and Labrador has been stated as follows:

> If an injury aggravates a pre-existing condition, full compensation is allowed for the acute stage. If full recovery is not possible, the pre-existing condition, if it is shown that it constituted a pre-existing disability, is *taken into consideration* when deciding on long term entitlement.
>
> With regard to relieving the employer of part of the cost of the claim, this is done on an ad hoc basis through our Second Injury and Enhanced Disability Fund. When the claims adjudicator is satisfied that the additional costs on a claim are related to pre-existing factors rather than directly related to the injury, the additional costs are transferred to this fund. [emphasis added][10]

It appears from this statement that the Newfoundland Commission practices apportionment in the absence of express statutory authority, applying the common law principles developed under the Thin Skull Rule.

2. ONTARIO

Ontario also has a silent statute on this issue. While there is no explicit statutory provision, the Ontario *Workers Compensation Act*[11] provides for the assessment of a "Special Fund" in s. 108(2) under which Ontario's policy on pre-existing conditions is promulgated.

> **S. 108(2)** The Board, where it considers proper, may add to the assessment for any class or classes or for all the classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

The Ontario policy deals, like many others, not only with the extent to which a claim may be compensated, but also as to how the cost of same will be allocated between the accident employer's assessment and the Second Injury and Enhancement Fund (S.I.E.F.).

The Ontario policy covers both physical and psychological disabilities[12] and is activated by the following findings of fact:

1) a relationship is shown between an underlying condition and the degree of disability arising from the accident; and

2) the period of treatment and recuperation is prolonged due to an underlying condition; and/or

3) an increased degree of residual disability occurs over that usually found in such cases owing to the underlying condition.[13]

If an industrial injury involves a static pre-existing condition where only temporary disability occurs, there will be no limitation of benefits throughout the period of the temporary disability.[14] With a deteriorating pre-existing condition, a claim for temporary disability will be allowed for the acute episode only (i.e. until the pre-accident rate of disability has reoccurred).[15] If the acute period of disability itself is prolonged due to the pre-existing condition, part of the compensation and medical aid costs may be transferred to the S.I.E.F.[16]

When dealing with a permanent disability involving an aggravated deteriorating pre-existing condition, the policy directive provides a mathematical formula involving "four aspects of evaluation":

[1] the value of the prior condition by itself [prior to the industrial accident];

[2] the value of the new condition by itself;

[3] the value of the entire disability;

[4] the enhancement factor, defined as the value of the entire disability minus the sum of the value of the prior and new condition,

i.e. [3]<->([1] + [2]).[17]

The worker's award for permanent disability "shall be the sum of the value of the new condition by itself [2]...plus the enhancement factor [4]."[18] The value of the enchancement factor will be charged to the S.I.E.F., thus affording financial relief to the employer.[19]

One exception is made to this policy: where the pre-existing condition consisted of non-compensable blindness or enucleation of one eye, and the industrial accident results in blindness or enucleation of the remaining eye, thus producing total blindness (or "absence of significant useful vision for occupational purposes"[20]): here the worker's award will in addition include an amount representing the value of the prior condition by itself [1]. The S.I.E.F. will bear the said additional cost as well as the enhancement cost.[21]

This mathematical formula applies where the pre-existing condition is "measurable"—i.e. "such as in the case of prior amputation or loss of movement in which the pre-existing condition has been or could have been rated for permanent disability."[22] But a more imprecise calculation is used for pre-existing conditions termed "non-measurable"—"which include generalized conditions, such as: diabetes, obesity and cardiac problems, as well as prior physical defects of the injured area, such as; prior injury or surgery, osteoarthritis, degenerative changes or congenital defects."[23] Surely in practical terms this would be the larger category in which claims would fall.

Here, a pre-existing condition is classified either as minor, moderate or major. The criteria by which these categories are assessed is stated to be as follows:

> The significance of the pre-accident disability should be considered in terms of the likely clinical rating that would have been assessed if the pre-accident problem had been compensable, having regard to the range of disabilities usually encountered in such a condition.[24]

An example is given for pre-existing back conditions:

> A condition producing occasional brief periods of disability, but minor restrictions on employability pre-accident (0-10%) could be considered minor.... If there had been moderate periods of disability and one or more surgical procedures (11% to 20%) it could be considered moderate.... If there had been multiple prior surgical procedures or a condition that had been producing major periods of disability with marked restrictions on working capacity (over 20%) it could be considered major....[25]

The criteria used to assess pre-existing psychological conditions is even more vague and, one suspects, terribly prone to subjective or ideological abuse:

> Pre-existing psychological disability would be assessed in terms of the limitations shown in the work record and social integration of the worker that have been produced by mental illness and/or defects of personality.[26]

Once the pre-existing condition is assessed as having been minor, moderate, or major, the permanent disability award is reduced accordingly, except for the "minor" category, where the full assessment is still awarded. In the "moderate" category, the worker will receive 75% of the total assessment. In the "major" category, the worker will receive only 50% of the total assessment.[27]

No ranges of award reduction are stated—just the flat reduction rate. It would seem, therefore, that if a worker's pre-existing back condition (for example) were rated at 25%, his/her pre-existing condition would be ranked as "major," but his/her total assessment would still be reduced by 50%.

When it comes to allocating the compensation costs between the accident employer's class and the S.I.E.F. when dealing with "non-measurable" pre-existing conditions, different criteria are used than when assessing the actual award to the worker. Not only is consideration given to the medical significance of the pre-existing condition, but the severity of the industrial accident also comes to bear on whether cost is shifted. The medical significance of the pre-existing condition is not assessed in terms of estimated pre-existing *disability* (as it is for determining the worker's award), but rather in terms of the extent to which the worker was thereby rendered *liable* to developing a more-severe-than-ordinary permanent disability.[28] This being the case, it appears conceivable that a pre-existing condition that could be classified as "minor" for the worker's award assessment could be classified as "major" for the cost allocation assessment. Presumably, this would encourage employers to take on "high risk" workers with less fear for their personal assessment ratings.

The formula for allocating cost is as follows:

—Pre-existing condition of minor significance
  –minor accident: 50% cost transfer [to S.I.E.F.]
  –moderate accident: 25% cost transfer
  –major accident: 0% cost transfer

—Pre-existing condition of moderate significance
  –minor accident: 75% cost transfer
  –moderate accident: 50% cost transfer
  –major accident: 25% cost transfer

—Pre-existing condition of major significance
  –minor accident: 90 to 100% cost transfer
  –moderate accident: 75% cost transfer
  –major accident: 50% cost transfer.[29]

A "minor" accident is one expected to cause non-disabling or minor disabling injury with complete recovery. A "moderate" accident is one expected to cause disabling injury with a possibility of permanent disability. A "major" accident is one expected to cause serious disability with a probability of permanent disability.[30]

3. QUEBEC

Although Quebec's Act is full of references and provisions for recurrence, relapse, and aggravation of pre-existing conditions, these all deal with situations where the pre-existing condition or disability is, in its own right, a compensable industrial injury.

It is unknown what policy Quebec pursues when the pre-existing condition is itself non-compensable.

B. SEMI-SILENT STATUTES

1. PRINCE EDWARD ISLAND

S. 6(7) of P.E.I.'s *Workers Compensation Act*[31] states that:

> Where an accident caused personal injury to a workman and that injury is aggravated by some pre-existing physical condition inherent in the workman at the time of the accident, the workman shall be compensated for the full injurious result, except where the pre-existing physical condition is due to an injury for which the workman is then receiving compensation or was at some earlier date receiving compensation which has been commuted.

The least controversial interpretation of what this section is saying is probably that made by Ison, *viz.* this section refers to *static* pre-existing conditions and explicitly states the principle that full compensation will be allowed for the residual disability without regard to the pre-existing condition.[32]

Under this interpretation, the phrase "some pre-existing physical condition inherent in the workman" must be construed to mean that no actual pre-existing deteriorating *disability* is in place. It may well be arguable, however, because of the vagueness of the word "condition" that this phrase might bear a wider interpretation, so that this section would then be an explicit statement that no apportionment would occur for aggravated deteriorating pre-existing conditions. The result would be that the worker would be compensated even for the pre-existing disability per se.

However, since this would produce results going far beyond even the common law principles, Ison's narrow reading is to be preferred.

So, on the view that s. 6(7) deals only with static pre-existing conditions, the statute is in effect "silent" on the point of aggravated deteriorating pre-existing conditions. This being so, the same considerations flow therefrom as for other silent statutes, and the common law principles apply.

One thing is clear, however; the pre-existing condition must be physical, not psychological.

The only policy statement located did not appreciably clarify the situation, as it merely stated: "We have applied this section on several occassions [sic] but each occassion [sic] is reviewed by this Board before approval is given."[33]

2. SASKATCHEWAN

S. 50 of *The Workers Compensation Act*[34] clearly applies to static pre-existing conditions alone and provides for full recovery of compensation for residual disability consonant with general principles:

> **S. 50** The board shall not reject the claim of a worker for compensation or reduce the amount of compensation payable to him by reason of a functional condition of the worker that exists at the time of the injury in respect of which compensation is claimed, where that condition did not result in any functional impairment to the worker and did not affect the ability of the worker in his employment.

The section does not deal with the case of aggravated deteriorating pre-existing conditions, except by inference, and so the Act in effect is silent as to proportionate entitlement. This being so, general common law principles of recovery should govern.

In accordance with these principles, Saskatchewan policy as well is to compensate for the difference between the previously existing impairment and the optimal recovery impairment, with provision for cases of enhancement of either the permanent physical impairment or loss of earning capacity.[35] These additional claims costs are charged to the Second Injury Fund.

C. STATUTES WITH EXPRESS PROPORTIONATE ENTITLEMENT SECTIONS

1. NEW BRUNSWICK

The New Brunswick *Workers' Compensation Act*[36] contains an express proportionate entitlement provision:

> **S. 7(5)** Where an injury or disease is superimposed on any prior existing disease or condition compensation shall be allowed only for such portion of the disability as may reasonably be attributed to the injury or disease unless the prior existing disease or condition did not result in any disability affecting the worker in his employment, in which case compensation shall be allowed without regard to such prior existing disease or condition and shall be borne by the fund referred to in section 66.

Section 66 is of course the provision establishing the Second Injury and Enhancement Fund:

> **S. 66** The Board where it deems proper may add to the assessment for any class of classes or for all the classes a percentage or sum for the purpose of raising a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance which in the opinion of the Board would unfairly burden the employers in any class.

Note that s. 7(5) explicitly provides that static pre-existing conditions will have no proportioning effect on the full compensation assessed, albeit the compensation will be borne by the S.I.E.F. According to Ison, this section explicitly avoids the danger inherent in proportionate entitlement provisions, which is that they

> may result in the pre-existing condition being discounted twice in the calculation of compensation. Unless the pre-existing condition was very recent, its effect on earning capacity will already be reflected in earnings, and therefore in the wage rate established on the claim. If a proportion of the residual disability is then attributed to the pre-existing condition, the net effect is that a deduction or allowance for the pre-existing condition has been made twice over. Once this difficulty is recognized, however, it can be avoided by interpretation...[and in] New Brunswick, the Act expressly requires the Board to avoid this result.[37]

This is all very true, but only insofar as static pre-existing conditions are concerned. Moreover, since by definition static pre-existing conditions result in no pre-accident disability, one would think this is the situation where the wage rate would be most likely to be unaffected in any event, except where the static pre-existing condition is such that lower wages are paid by virtue of the worker having a visible vulnerability despite the fact there is no functional impairment. The problem of double discounting would still remain in the aggravated deteriorating pre-existing condition situation and it seems to me that s. 7(5) does not relieve this result.

There are two New Brunswick cases illustrating the previously-discussed general principle that, no matter how compensation may be apportioned, the existence of a pre-existing condition is no bar to the resultant injury (or death) being legally an "accident" within the meaning of the Act, so long as the employment contributed in some respect to the occurrence of the accident.

In *Dunham* v. *Workmens' Compensation Board,*[38] a firetruck driver with a pre-existing condition of heart disease suffered a fatal heart attack while performing his normal duties at a fire. In *Re Arsenault,*[39] a tractor operator at a paper mill, who had a pre-existing condition of heart disease, suffered a fatal heart attack while on the job performing his standard duties. In both cases, the men could equally well have died at home at any time. In both cases the law was applied that recovery of compensation does not depend on the worker in such a situation having engaged in any strenuous work, unusual exertion or unaccustomed strain. They died on the job, performing their usual duties; thus, employment is a cause of the accident even though the deceased men were peculiarly vulnerable to injury and this is sufficient to fix liability on the workers' compensation system.

In terms of the stated policy of the New Brunswick Workers Compensation Board in dealing with, and apportioning claims pursuant to s. 7(5), it is virtually identical in every regard with the Ontario policy as outlined above.[40]

2. NOVA SCOTIA

The proportionate entitlement section of Nova Scotia's *Workers Compensation Act*[41] is s. 7(2):

> Where the personal injury by accident results in injury or disease due in part to the employment and in part due to causes other than to the employment or where the personal injury aggravates, activates or accelerates a disease or disability existing prior to the injury, compensation shall be payable for such proportion of the disability and disablement as may reasonably be attributed to the personal injury sustained.

This section is notable for explicitly extending proportionate entitlement both to injuries and diseases.

Cost allocation is not an issue in Nova Scotia as there is no Second Injury Fund.

3. BRITISH COLUMBIA

The B.C. *Workers Compensation Act*[43] has a straightforward proportionate entitlement provision in section 5(5):

> Where the personal injury or disease is superimposed on an already existing disability, compensation shall be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease shall, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

The phrase "already existing *disability*" limits the application of s. 5(5) to those cases where the pre-existing condition is of a deteriorating nature. Thus, where an injury is superimposed on a static pre-existing disability, full compensation will follow without reduction.[44]

Nor is s. 5(5) applied to cases of temporary disability or medical aid. "Proportionate entitlement is... a concept applicable only to permanent disability awards."[45]

Board policy provides that the word "disability" in s. 5(5) means "loss of body function or physical impairment."[46]. There is nothing in the statute to restrict its meaning so as to exclude psychological disabilities, but the Board has chosen to limit its applicability in this manner.

The policy distinguishes three types of deteriorating pre-existing condition situations, in only one of which should proportionate entitlement be used to reduce the workers' award:

1. In cases where it has been decided that the precipitating event or activity, and its immediate consequences, were so severe that the full disability presently suffered by the claimant would have resulted in any event, regardless of any pre-existing disability, Subsection 5(5) should not be applied.

2. In cases where the precipitating event or activity, and its immediate consequences, were of a moderate or minor significance and where there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, proportionate entitlement should not be applied. These cases should not be classified as a disability where there are not indications of a previously reduced capacity to work and/or where there are no indications that prior ongoing medical treatment had been requested and rendered for that apparent disability. In determining whether there has been ongoing treatment, regard will be had of frequency of the past treatments and how long before the injury they occurred.

3. Once again, where the precipitating event or activity, and its immediate consequences, were of moderate or minor significance, but x-ray or other medical evidence shows a moderate to advanced pre-existing condition or disease, and there is also evidence of a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability, Subsection 5(5) should be applied.[47]

When dealing with spinal column or back injuries, the Board uses a "dual system" of assessing permanent disability pensions. A pension is calculated on the basis of degree of physical impairment, another is calculated on the basis of projected loss of earnings, and the worker receives the higher of the two. Where a pre-existing disability is involved, s. 5(5) will be applied regardless of whether the pension is based on the physical impairment method or the projected loss of earnings method.[48]

As in most jurisdictions, B.C. has a policy of allocating costs of pre-existing condition enhancements to a special fund. B.C.'s "Reserve Fund" is specifically provided for in s. 39(1)(e) of the Act.:

> s. 39(1)(e) Provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability.

Relief to employers, of course, is not determined by the same criteria as awards to workers. So, for example, a worker suffering a temporary disability where the recovery period is enhanced or lengthened due to a pre-existing condition will receive full benefits, and s. 5(5) will not be applied. But the additional costs will still be allocated to the Reserve Fund under s. 39(1)(e) so as to provide relief to the employer.[49]

4. ALBERTA

The *Workers Compensation Act*[50] of Alberta provides as follows:

> **S. 59(1)** If a worker suffers permanent disability as the result of an accident and the injury aggravates a pre-existing condition, the Board may, in addition to compensation it pays in respect of that part of the disability caused by the accident, pay to the worker a supplement in an amount determined by it in respect of that part of the disability caused by the pre-existing condition, subject to the maximum amount payable pursuant to section 51.
>
> **(1.1)** Subsection (1) applies regardless of whether the accident that gave rise to the right to compensation occurred before or after the coming into force of this Act.
>
> **(2)** A supplement under subsection (1) is payable until the enhanced disability ceases or the worker reaches the age of 65 years, whichever occurs first.

Note that this section deals only with situations where permanent disability occurs. The policy concerning temporary disability is that where a claim is allowed on the basis of an aggravational factor, the Board will not impose a pre-determined limitation on the payment of temporary disability benefits.[51]

It is also noteworthy that the section is not mandatory. The Board, "may" pay the supplement; it is not obliged to.

Alberta policy defines claims in which there is a compensable aggravation of a pre-existing condition as being those where:

> (i) There is evidence of a pre-existing condition which has been deteriorated by the effects of a compensable accident or work activity and
> (ii) The level of disability caused by the pre-existing condition has been raised to the point where treatment of the condition is required in order to return the worker to his pre-accident state or better.[52]

Where such an aggravation exists,

> the worker shall be advised immediately of the limitations of our responsibility:
> (i) The Board is only responsible for the aggravational factor and not for the pre-existing condition.
> (ii) The assessment of any Permanent Partial Disability Award would be restricted to the degree of disability that can be said to be due to the aggravation.[53]

The conditions under which the Board would "consider" allowing a supplemental allowance in respect of a pre-existing condition are stated as being where:

> (a) a compensable permanent disability aggravates a pre-existing condition, *and*
>
> (b) the pre-existing condition creates an enhancement of the compensable permanent disability for which the assessed permanent disability award does not, by itself, adequately compensate.[54]

Clearly, the Alberta policy interprets this section in a manner similar to which all other jurisdictions interpret their sections or apply common law principles.

The more involved wording of the Section could lead to an interpretation that the Board may compensate, not merely the enhancement, but also a portion of the disability which results solely from the pre-existing condition per se. The use of the phrase "that part of the disability *caused* by the pre-existing condition" is unfortunate, and may be the reason why the Board stresses that the limitations of the Board's responsibility must be made clear to the worker at the outset.

In any event, costs flowing from this policy are normally charged to the Board's Reserve for Enhanced Disabilities.[55]

The Alberta policy also makes provision for a "Rehabilitation Surgery Allowance" when dealing with certain situations of otherwise non-compensable pre-existing conditions:

> Where a worker claims compensation for a work related injury, and there is reason to believe that surgical treatment of a pre-existing non-compensable condition might result in a restoration of earning capacity, or reduce or eliminate recurring claims, the Board may consider the payment of a Rehabilitation Surgery Allowance. Such an allowance, equal in value to the worker's calculated rate of compensation immediately prior to treatment will, when granted, usually be payable from the date of hospital admission. An approved allowance would also include a reasonable period of convalescence.[56]

But if such surgery or treatment itself results in any disability or condition, "no consideration" will be given to further compensation. This allowance is not offered if the worker can get comparable benefits from the employer or a source other than the Board.[57]

5. MANITOBA

S. 34.1 of our *Workers Compensation Act*[58] perhaps most closely resembles the Alberta provision than those of other jurisdictions. This is so because it *apparently* notionally separates the concepts of compensation for the industrial injury from the concept of compensation for enhancement. Yet s. 34.1 is extremely vague in its wording and may mean more than a conservative reading would indicate.

> **S. 34.1(1)** Where a workman suffers an injury in an accident in respect of which compensation is paid under this Act and there is a relationship between that injury and a pre-existing or underlying condition, the board shall, in addition to any disability compensation arising out of the accident, pay compensation in respect of the pre-existing or underlying condition and that compensation shall not be less than fifty per cent of the amount that the board would have awarded if the whole of the disability had arisen from the accident.
>
> **Definition of "pre-existing or underlying condition".**
>
> **s. 34.1(2)** In this section "pre-existing or underlying condition" means a condition of the workman which existed or was discernible as an underlying condition before the accident and includes a neurosis and a psycho-neurosis.

The Board policy, at its most generous, treats this section as establishing the usual form of proportionate entitlement with provision for enhancement of deteriorating pre-existing conditions in a manner similar to other jurisdictions and modelled after Ontario in many respects.

But reading the problematic wording may lead to another, much wider interpretation of its effect.

Note that the pre-existing condition must have "existed" or been "discernible" before the industrial accident. The definition does not say that it must cause disability prior to the industrial accident (in other words, be deteriorating). A static pre-existing condition may equally well be "discernible" prior to the accident. This being the case, s. 34.1 may perhaps be interpreted equally well as providing for proportionate entitlement for static as well as deteriorating pre-existing conditions, which would be a major change to the Thin Skull Rule principle.

That s. 34.1(1) provides for basic proportionate entitlement is reasonably clear by logical inference, although circuitously worded. But it could be interpreted as providing as well for a novel benefit: direct albeit limited compensation for the pre-existing condition itself.

It seems reasonable that if the basic effect of this section were not proportionate entitlement, then workers with pre-existing conditions would receive full compensation for their residual disabilities without regard to the pre-existing condition, plus reap an additional windfall for the pre-existing condition, and thus be in a better position than workers without pre-existing conditions. So, as stated, it is by logical inference that one must conclude that the phrase "disability compensation arising out of the accident" sets in place a standard calculation of proportionate entitlement of the same nature as in the other jurisdictions.

But does s. 34.1(1) go beyond proportionate entitlement and make it mandatory that the Board "shall, in addition" pay a partial compensation for the pre-existing condition itself? A narrow interpretation of this provision could hold that this merely provides for the enhancement factor, if any. That such a narrow interpretation may not be an accurate representation of the effect of this provision is arguable from the following considerations:

1) the general principles involved in proportionate entitlement themselves account for enhancement factors (as being disability arising "out of the accident");
2) s. 34.1(1) itself states no such qualification or limit on the additional compensation;
3) the condition that this additional compensation shall not be less than 50 per cent of the compensation that would have been awarded if no pre-existing condition had been involved could be interpreted as militating against its being tied to computable enhancement factors (which could well produce amounts less than the specified "50 per cent").
4) The broad scope of s 34.1(1) is even more apparent when juxtaposed with s. 4(4), which provides for straight proportionate entitlement in cases of industrial *disease*:

> **S. 4(4)** Where the personal injury consists of a disease, in part due to the employment and in part due to causes other than the employment, the compensation paid shall be the same proportion of the whole of the compensation that would have been payable had the personal injury been wholly due to the employment as the part of the personal injury that is due to the employment is of the whole of the personal injury.

Needless to say, it would be an extremely liberal policy to compensate, even partially, for the pre-existing condition per se, and would exceed the scope of compensation dictated by common law principles of recovery. Even if this speculation should be ultimately untenable as representing the intention of the legislature in enacting s. 34.1, it is at least arguable and by even so being, illustrates that the wording and intent of this section should be clarified and tightened up considerably, so people will not get the wrong idea about that to which they may or may not be entitled.

On the assumption, therefore, that s. 34.1 establishes basic proportionate entitlement in cases of aggravated deteriorating pre-existing conditions with the enhancement factor accounted for, what are the details of the stated Manitoba Board policy?

As mentioned, the Manitoba Policy is basically a restatement of Ontario policy as it existed in 1972 (the date s. 34.1 was added to our Act).[59]

The policy distinguishes between "measurable" pre-existing conditions and "non-measurable" ones.

"Non-measurable" conditions are defined as being of two varieties.

> (1) where a prior permanent physical condition (such as diabetes or circulatory diseases) is not measurable and would not necessarily have been disabling in itself but the compensable accident precipitates a reaction causing loss of function of [sic] amputation of a part of the body.[60]

In other words, these are "static" pre-existing conditions. Here, the amount of compensation will be based on the actual loss, i.e., the full degree of residual disability. The Second Injury and Enhancement Fund (S.I.E.F.) will be charged with the entire amount of the award for permanent disability, as well as that proportion of the temporary compensation and medical aid costs as exceeds the probable cost of the claim had the pre-existing condition not been present.[61]

> (2) where the prior permanent physical condition is not measurable (such as heart disease or degenerative disc disease) but was, or probably would have become permanently disabling eventually and is activated or aggravated by a compensable accident to the extent that permanent disability results[62]

For these types of deteriorating pre-existing conditions, the reduction in the worker's award is calculated as a percentage.

> Where the effect of the prior condition is high and the aggravating accident is minor, the award shall be fifty per cent of the ratable value of the permanent disability....
>
> Where the effect of the prior condition is low and the aggravating accident is serious, the award shall be ninety per cent of the ratable value of the permanent disability....
>
> Graduations may be applied at sixty per cent, seventy per cent and eighty per cent of the ratable value of the permanent disability for variations between the upper and lower limits according to the evidence.[63]

As for allocation of costs to the S.I.E.F., an inverse ratio system is established.

Deteriorating pre-existing conditions which are "measurable" are those "such as prior amputations or loss of movement in which the pre-existing condition has been, or could have been, rated for permanent disability."[64] The amount of compensation here will be the value of the new condition by itself plus the enhancement factor (the value of the entire disability less the sum of the values of the prior and new conditions). The enhancement factor is charged to the S.I.E.F. The same exception exists for loss of sight as currently exists under the Ontario policy.[65]

The Board Policy states that no reduction is to be made to the worker's award where the assessment of his/her disability is 15 per cent or less.[66]

The 1972 Policy Statement was clarified by Inter-Departmental Memo of January, 1986. It appears to clarify the inferences to be drawn about continuation of benefits where the medical evidence is unclear or inconclusive.

Attached hereto as Schedules A, B, and C, respectively are copies of the 1972 Policy Statement, the 1986 Clarification Statement, and the Board Directive dated November 20, 1985 which discusses spondylolysis/spondylolisthesis although this latter does not directly discuss Pre-existing Condition Policy.

Attached as well as Schedule D are Minutes from a meeting held October 3, 1984 at which Board officials discussed the problems it was having in administering the policy. Being brief encapsulations, the Minutes are not informative on specifics, but are included for the sake of completeness.

One pre-existing condition is specifically mentioned in the Act: hernia. The section is self-explanatory:

> **S. 4(13)** Notwithstanding anything in this section, in the case of a pre-existent hernia that has become strangulated or seriously aggravated by strain or accident arising out of, and in the course of, the employment; or if there has been excusable failure on the part of the workman to make a report respecting the hernia or any strangulation or aggravation thereof caused by strain or accident arising out of and in the course of the employment; the board may order payment of the claim or any part of the claim if it is of the opinion that the claim is a just one and ought to be allowed.

V. CONCLUSION

Despite the differences in wording among the provisions, or lack thereof, across the provincial jurisdictions, it appears that all stated policies treat pre-existing conditions in the same basic manner:

1) where the pre-existing condition is static, the worker will receive compensation for the full extent of the residual permanent disability;

2) where the pre-existing condition is deteriorating:

   a) if it is not aggravated, accelerated or enhanced by the industrial injury, no compensation will be allotted to it, since no factual relationship exists between it and the industrial injury;

   b) if it is aggravated, accelerated or enhanced, then compensation will follow for the portion of the residual permanent disability represented by such aggravation, acceleration or enhancement, in addition to compensation for the residual disability emanating from the industrial injury per se. Formulae may calculate this enhancement factor with greater or lesser accuracy.

These policies are in the tradition of common law principles and the Thin Skull Rule—workers do not receive more than they would at common law, nor should they receive less.

Again, in conclusion, it must be stressed that stated policies may not mirror the reality of awards supposedly generated thereby, if the Boards misinterpret, misunderstand, or misapply the concepts underlying these principles of compensation.

FOOTNOTES

1. T. Ison, *Workers' Compensation in Canada* (Toronto: Butterworth's, 1983), pp. 69–70.
2. John G. Fleming, *The Law of Torts* (6th ed.) (Sydney: The Law Book Company Limited, 1983), pp. 181–182.
3. Kenneth D. Cooper-Stephenson and Iwan B. Saunders, *Personal Injury Damages in Canada* (Toronto: The Carswell Company Limited, 1981), p. 620.
4. John Munkman, *Damages for Personal Injuries and Death* (6th ed.) (London: Butterworth's, 1980), p. 36.
5. [1924] 1 D.L.R. 206.
6. *Id.*, p. 216.
7. *Supra* n. 1, at pp. 69–70.
8. Michael I. Nash, *Canadian Occupational Health and Safety Law Handbook* (Toronto: C.C.H., 1983), pp. 175–176.
9. S.N. 1983, c. 48, as amended.
10. Letter dated March 13, 1985 from the Executive Director of Claims Services of Workers Compensation Commission of Newfoundland and Labrador, included in Association of Workers Compensation Boards of Canada Bulletin dated June 19, 1985.
11. R.S.O. 1980, c. 539, as am.
12. Workers Compensation Board of Ontario, *Board Policies and Administrative Directives*, p. 235.
13. *Ibid.*
14. *Ibid.*
15. *Ibid*
16. *Ibid*
17. *Id.*, p. 237.
18. *Ibid.*
19. *Ibid.*
20. *Id.*, p. 238.
21. *Ibid.*
22. Workers Compensation Board of Ontario, *Claims Adjudication Branch Procedures Manual*, p. 33-02-20-01.
23. *Ibid.*
24. *Supra* n. 12, p. 238.
25. *Id.*, p. 239.
26. *Id.*, p. 238.
27. *Ibid.*
28. *Id.*, p. 240.
29. *Ibid.*
30. *Id.*, p. 241.
31. R.S.P.E.I. 1974, ch. W-10, as amended.
32. *Supra* n. 1, p. 69n.
33. Letter dated March 6, 1985 from the Executive Director, The Workers Compensation Board of P.E.I., included in Association of Workers Compensation Boards of Canada Bulletin dated June 19, 1985.
34. S.S. 1979, ch. W-17.1, as amended.
35. Letter dated November 1, 1984 from the Director of Claims, Saskatchewan Workers Compensation Board to Workers Compensation Board of Manitoba.
36. R.S.N.B. 1973, ch. W-13, as amended.
37. *Supra* n. 1, p. 71 and p. 71n.
38. (1967), 67 D.L.R. (2d) 726 (N.B.C.A.).
39. (1983), 48 N.B.R. (2d) 348 (W.C.B. of N.B.).
40. New Brunswick Workers Compensation Board, *Adjudication Manual*, pp. 10-02-19-01-02.
41. R.S.N.S. 1967, ch. 343, as amended.
43. R.S.B.C. 1979, ch. 437, as amended.
44. Workers Compensation Board of British Columbia, *Rehabilitation and Claims Manual*, 1984, p. 6–36.
45. *Id.*, p. 6–37.
46. *Ibid.*
47. *Id.*, pp. 6–36 to 6–37.
48. *Id.*, p. 6–38.
49. *Id.*, pp. 17–8 to 17–9.
50. R.S.A. 1980, ch. W-16, as amended.
51. Workers Compensation Board of Alberta, *Claims Department Policy Manual*, Policy Statement ADJ-25-1.
52. *Id.*, Statement PROC-53-1.
53. *Id.*, Statement PROC-53-2.
54. *Id.*, Statement ADJ-30-1.
55. *Id.*, Statement ADJ-30-2.
56. *Id.*, Statement ADJ-27-1.
57. *Ibid.*
58. R.S.M. 1970, ch. W-200, as amended.
59. Workers Compensation Board of Manitoba, *Policy Regarding Pre-existing Conditions and Second Injury Fund* (August, 1972), p. 1.
60. *Id.*, p. 3.
61. *Ibid.*
62. *Ibid.*
63. *Id.*, p. 4.
64. *Id.*, p. 2.
65. *Id.*, pp. 2–3.
66. *Id.*, p. 4.

Prepared for: Workers Compensation Act Legislative Review Committee

Prepared by: Debra Hathaway

Date: September, 1986

SCHEDULE A

THIS POLICY ORIGINATED IN ONTARIO AND WAS ADOPTED BY THE MANITOBA BOARD ON AUGUST 1/72

POLICY REGARDING PRE-EXISTING CONDITIONS AND SECOND INJURY FUND

The 1972 amendments (section 23 of Bill 63) provides for payment of compensation in respect of pre-existing or underlying conditions that are related to an injury suffered in a compensable accident at not less than 50% of the amount that the Board would have awarded if the whole of the disability had arisen from the accident.

Section 66(1) provides in paragraphs (d) and (e) for special funds to equalize disasters or other inequitable circumstances, and to cover the costs of enhanced disabilities due to existing disabilities prior to the accident in question.

This policy applies in all cases where benefits are payable and there is a relationship between a pre-existing or underlying condition and the injury arising from the accident, *and where an increased degree of residual disability occurs* over that usually found in such cases owing to the pre-existing or underlying condition (including neurosis and psychoneurosis).

The guide lines are set out in several parts, each part is shown separately and guides for the transfer of costs to the second injury fund are included. Categories in respect to permanent disability cases are shown under Part 3.

Determination at Initial Adjudication:

Part 1: In any case involving benefits where there is evidence of the disability following accident being enhanced because of similar or other disabilities previously suffered, such claim shall be considered to be in the same category as those in which there has been aggravation of a pre-existing condition, and in respect of the period of temporary disability and medical aid, 50% of the cost shall be charged to the Second Injury Fund. This includes claims involving neurosis and psychoneurosis.

Part 2: The application of the Second Injury Fund be extended to include charging the full cost of a claim to the Second Injury Fund in the following types of cases:

a) where the prior condition is the cause of the accident, for example, epilepsy.

b) where the wearing of an artificial appliance has been the cause of the accident.

c) where a handicapped person having been placed in industry through our Vocational Rehabilitation Department suffers a recurrence of the original disability or extension of disability through minor accident.

d) i) where a workman suffers accident during an on-the-job training programme sponsored by the Vocational Rehabilition Department.

ii) where a workman suffers an accident in a trade school or other type of formal training procedure sponsored by the Vocational Rehabilitation Department.

Determination at Consideration of Permanent Disability:

Part 3: The criteria as set out in the following categories are to be used for transfers to the Second Injury Fund in all cases with respect to permanent disability. Where the determination of the extent of transfer to the Second Injury Fund is higher at consideration of permanent disability than 50%, the employer is to receive the benefit of such determination throughout the whole claim by adjustment.

CATEGORY 1—Measurable Prior Condition Condition (*sic*):

1. This category applies where the prior condition was measurable and the impairment of total body function resulting from the new disability is increased beyond the degree usually associated with such disability because of the prior condition.

This situation occurs in cases such as prior amputations or loss of movement in which the pre-existing condition has been, or could have been rated for permanent disability.

In such cases, there are three aspects of evaluation:

a) the value of the prior condition by itself,

b) the value of the new condition by itself,

c) the enhancement factor which is the value of the entire disability less the sum of the values of the prior and new conditions.

2. In every case to which this section applies (excepting loss of sight or enucleation of an eye in a case where the pre-existing disability is the loss of sight or enucleation of the other eye and for which no award has been made), the award for permanent disability shall be the sum of the values of the new condition by itself (1. b) and the enhancement factor (1. c).

The Second Injury and Enhancement Fund shall be charged with the enhancement factor (c) above.

3. In cases of loss of sight or enucleation of an eye where the pre-existing disability was the loss of sight or enucleation of the other eye, the award shall be the total of 1(a) (b) and (c). The charge to the Second Injury and Enhancement Fund shall be the individual value of the prior condition plus the enhancement factor as in 1(a) and (c) above.

CATEGORY 2—Prior Conditions which are not Measurable or of a Disabling Character

1. This category applies where a prior permanent physical condition (such as diabetes or circulatory diseases) is not measurable and would not necessarily have been disabling in itself but the compensable accident precipitates a reaction causing loss of function of (*sic*) amputation of a part of the body.

2. In such cases, the award for permanent disability shall be based on the actual loss.

The Second Injury and Enhancement Fund should be charged the entire cost of any award for permanent disability and, in addition, should be charged such proportion of the temporary compensation and medical aid costs as the Board's medical department considers exceeds the probable cost of the claim had the prior condition not existed.

CATEGORY 3—Prior Conditions which are not Measurable but are of a Disabling Character or of a Potentially Disabling Character

1. Where the prior permanent physical condition is not measurable (such as heart disease or degenerative disc disease) but was, or probably would have become permanently disabling eventually and is activated or aggravated bv a compensable accident to the extent that permanent disability results, three factors are to be taken into consideration in evaluating the permanent disability award:

a) whether or not there was clinical manifestation of the pre-existing condition prior to the accident,

b) whether or not the pre-existing condition was of a serious nature.

c) the severity of the accident aggravating the prior condition.

In these cases, the permanent disability award shall be a percentage of the permanent disability between fifty per cent and ninety per cent of the ratable value of the permanent disability as outlined in 3(2) (3) and (4).

2. Where the effect of the prior condition is high and the aggravating accident is minor, the award shall be fifty per cent of the ratable value of the permanent disability.

3. Where the effect of the prior condition is low and the aggravating accident is serious, the award shall be ninety per cent of the ratable value of the permanent disability.

4 Graduations may be applied at sixty per cent, seventy per cent and eighty per cent of the ratable value of the permanent disability for variations between the upper and lower limits according to the evidence.

In such cases, the Second Injury and Enhancement Fund shall be charged with a percentage of the total cost of the claim in inverse ratio to the percentage calculation formulae for permanent disability as outlined in 3(2) (3) and (4) so that the charges will be as follows:

For cases under section 3(2) ninety per cent of the entire cost of the claim shall be charged to the Fund.

For cases under section 3(3) fifty percent of the entire cost of the claim shall be charged to the Fund.

For cases under section 3(4) where the permanent disability award is sixty per cent of the ratable value, the Fund shall be charged eighty per cent of the cost of the claim and where the permanent disability award is seventy per cent of the ratable value, the Fund shall be charged seventy per cent of the cost of the claim and where the permanent disability award is eighty per cent of the ratable value, the Fund shall be charged sixty per cent of the cost of the claim.

Part 4: No reduction shall be made in the pension payment to the workman where the assessment of his disability is 15% or less.

Part 5: In claims for industrial hearing loss where the pre-employment audiometric examination establishes a hearing level the employer is to be charged only with costs arising from that portion of the deafness which is due to employment with that employer, the balance being charged to the Second Injury Fund. Where no pre-employment audiometric examination took place the employer is to be charged in ratio by years to the workman's total exposure employment, the balance being charged to the Second Injury Fund.

Part 6: Accounting procedures be adjusted to show the transfer to the Second Injury Fund on the employer's cost statement. The transfer of costs should be made as soon as it is practicable after the decision to apply the Second Injury Fund has been made.

SCHEDULE B

THE WORKERS COMPENSATION BOARD OF MANITOBA INTER-DEPARTMENTAL MEMO

...

CLARIFICATION OF BOARD POLICY DATED AUGUST 1, 1972 — REGARDING PRE-EXISTING CONDITIONS AND SECOND INJURY FUND

January 24, 1986

The following is an excerpt from the Minutes of the regular meeting of the Board of Commissioners, January 16, 1986.

"Background"

Section 34.1(1) of *the Workers Compensation Act* refers to pre-existing conditions and the need for a "relationship" between the injury and the pre-existing condition before this section becomes effective.

Section 34.1(1) was effective July 11, 1972, and the conclusion reached as to application of the section since then has been difficult as, through the years, applications of Section 34.1(1) to individual cases appears to have been inconsistent.

During research of this topic it was also noted in Hansard (June 8, 1972—Page 2773) the intent of the legislation was to provide for "payment of compensation in respect of a pre-existing condition where the workman suffers an injury and the disability is due to a combination of the injury and a pre-existing or underlying condition."

Authority

Legal opinion has been obtained to clarify the specific wording of this section, its intent and application.

As well, the Board is of the view it has the prerogative to determine at which point, if any, such payment of compensation continues. The Boards's authority to do so is provided under Section 51 of the *Workers Compensation Act*.

Documentation

The Board is also of the view that before any determination by the adjudicator takes place as to ongoing Workers Compensation Board responsibility, all necessary medical documentation and/or other information should be solicited.

(a) If that information establishes the claimant has recovered from the compensable injury, has returned to the pre-accident state, and is capable of performing the pre-accident employment, the Workers Compensation Board responsibility is considered to have been temporary.

(b) If the information reveals objective medical findings due to either the pre-existing condition or accident injuries to warrant disability, compensation will continue.

(c) When the objective medical findings are inconclusive as to the claimant's ability to return to work, and the other relevant data supports the position that either the pre-existing or compensable condition continues to prevent the return to work, payment of compensation will continue."

...

SCHEDULE C

BOARD DIRECTIVE APPROVED NOVEMBER 10, 1985

ADJUDICATION (CLAIMS & MEDICAL)

Subject

SPONDYLOLYSIS/ SPONDYLOLISTHESIS

Background

Statistics reveal that approximately 26% of Workers Compensation Board claims involve injury to the back, with the majority of these claims involving conditions initially diagnosed as strains/sprains.

Although there are no specific figures at hand, there are a significant number of claims in which the worker has a pre-existing condition in the back, which may or may not be a factor in the compensable claim. Two of these pre-existing conditions are those of spondylolysis and spondylolisthesis.

The Board is aware that the adjudicators and medical officers have no specific guidelines set out to utilize when dealing with these types of conditions and, therefore, it is considered appropriate to provide some information to assist to that end.

The following, therefore, is presented in an effort to better understand these conditions, their possible relationships to a compensable back injury, and outlines the criteria to be utilized when the adjudicator and medical officer endeavors to establish whether or not spondylolysis or spondylolisthesis is a factor in the compensable condition.

Definition

Spondylolysis is the breaking down of a vertebra. It is a condition present in approximately 4.4% of the population. Spondylolysis may be due to a congenital abnormality, i.e., failure of bony fusion of the pars or due to trauma, such as a fracture through the pars interarticularis (the division or part between a joint or the place of union between two or more bones), following which healing does not occur by bony union.

Spondylolysis may be asymptomatic and only discovered by x-ray examination of the back for an unrelated condition.

Spondylolisthesis is a condition whereby there is a forward subluxation (slippage) of the body of a superior vertebra on the body of the vertebra below, due to the presence of the spondylolysis.

Under normal circumstances, spondylolisthesis is prevented by the articular facets and their ligaments, and the integrity of the bony elements of the vertebra.

Conditions such as disease or traumatic processes which may weaken any or all of these parts may lead to listhesis (slippage or subluxation).

Spondylolisthesis is more likely to be symptomatic, because of the additional strain and instability placed upon the various parts of the vertebral column and muscle attachments, in the attempt to maintain normal alignment of the vertebra.

The pathological mechanics of aggravation to a spondylolisthesis is a musculo-ligamentous strain or sprain, which causes further instability of the loose lamina associated and inherent in the condition because of its instability due to the isthmus (narrow connection between two larger bodies or parts) defects which caused the condition in the first place.

Patients may complain of continued symptoms after initial sprain, and this may well be a result of the stretching of the muscles and the ligament, which created a loosening of the lamina, causing an instability which, in most cases, would not be repairable by normal, natural body healing processes. This would, therefore, remain so until the segment is stabilized by spinal fusion.

The instability and its persistence also cause radicular (root) signs to pass into the leg(s) and mimic a disc protrusion. It is the presence or persistence of this which may lead to a fusion, as the quality of life of the claimant is persistently interfered with by unremitting pain.

It is sometimes implied that the evidence for work-related degeneration is greater than evidence in favour of the genetic or inherited degeneration of the spine, and the documentation in support of either must be carefully considered and weighed at the time of adjudication.

The relationship of back trauma with respect to a pre-existing spondylolysis and the production of back symptoms or signs and/or spondylolisthesis is not always obvious if there is no objective evidence to support such a causal relationship.

Criteria

Adjudication opinions may be based upon the presence or absence of objective and subjective supporting evidence. The following, therefore, should be utilized by the adjudicators and Medical Officers when rendering a decision or opinion as to whether ongoing aggravation or enhancement is present. It need not be necessary for all elements to be present before making such a decision, or providing an opinion.

Objective Signs:

(a) There should be neurological evidence of nerve root compression or nerve root irritation subsequent to the accident, such as radiculitis (referred pain, muscle spasm, loss of normal curve, limitation of leg raising).

(b) There could be evidence of a disc injury subsequent to the accident (i.e., x-ray evidence, myelogram, or signs and symptoms).

(c) There should be continuity of symptoms to the low back or legs, with pathological findings to account for the degree of symptomatology.

(d) There should be evidence of spondylolisthesis subsequent to the accident, or increased slippage in a pre-existing spondylolisthesis (revealed possibly by x-ray).

(e) There could be evidence of a traumatic fracture of the pars interarticularis where none previously existed.

(f) There could be chronic spasm in the hamstring muscles, either uni-lateral or bi-lateral, causing limitation of straight leg raising, or in extreme cases, a waddling due to flexion of the hips and knees caused by hamstring muscle spasm.

(g) There should be no evidence on record that the aggravation had ceased from the time of injury, or no period in which it could fairly be said that the claimant was symptom-free from that aggravation.

Objective findings, as noted, provides substantive support in establishing a relationship between the condition and the accident.

Subjective Signs:

(a) There should be continuing complaints of symptoms of related pain (unabated symptomatology), tenderness,and reference of pain to the legs.

Subjective complaints cannot usually be substantiated and must be taken at face value, based on the perceived credibility of the claimant.

Procedure

Claims involving spondylolysis/spondylolisthesis should initially be identified by the adjudicator. The adjudicator in turn should refer such cases to the Medical Department for an opinion and input as to Workers Compensation Board responsibility. All concerned should bear in mind the previously established criteria.

In context with adjudication of the conditions of spondylolysis and and spondylolisthesis, the adjudicator must keep in mind the possible aggravation or enhancement of these conditions vis-a-vis the accident, in order to assist in determining ongoing Workers Compensation Board responsibility, particularly relative to Section 34.1 of the *Workers Compensation Act*.

Aggravation may well be illustrated by means of ongoing symptomatology related to the soft tissue stresses, such as ligamentous and strain of those muscles attached to the defective lamina and related spinus process.

Aggravation is essentially a temporary phenomenon and continuity of subjective pain complaints referrable to the low back or legs without objective clinical findings is not generally regarded as enhancement or acceleration of the pre-existing condition.

The basic pre-existent condition is susceptible to normal degeneration and episotic or continual pain symptomatology and is physically restrictive in terms of vocational activities.

Enhancement may well include the presence of signs and symptoms greater than the pre-existing state, or an increase in the size of the defect. There may be objective evidence of injury to the intervertebral disc of the affected spinal unit.

Enhancement of the pre-existing processes is definitely established by objective findings of recent disc injury or traumatic fracture of the pars interarticularis of chronic spasm of the hamstring muscles post-accident.

Enhancement is substantiated within reasonable doubt in the event of objective neurological findings regarding nerve root irritation subsequent to the accident.

Summary

It could be said the degeneration of the spine is a naturally occurring condition. In spite of the lack of scientific papers to support the statement, the rate of degeneraton of the spine is most likely genetically related.

When degeneration of the spine has been proven to exist, it can be said the spine is in a state of degeneration. If an injury occurs to the spine, then that injury has been superimposed on a pre-existing condition. As a result of that injury, an aggravation may occur to the pre-existing condition, or the injury may prove to be more extensive, in which case, enhancement of the pre-existing condition may occur.

If repeated injury with proven enhancement at each injury occurred over a period of time, then the rate at which that degenerative spine might degenerate in the future could be accelerated.

There would have to be, however, clearly documented clinical findings upon which a judgment of aggravation, enhancement, or eventually, acceleration, could be assessed or judged to have taken place.

The occupation of the individual is not responsible for the state of the spine in its entirety and neither does the date of identification of a spondylolysis/ spondylolisthesis spine constitutes the requirement for acceptance as being totally related to a workplace environment.

It should be clearly noted, however, that as long as a claimant is considered to have a spondylolysis or spondylolisthesis condition and there is a relationship between that condition and the compensable injury, as determined by the Board in accordance with the appropriate directives/procedures, ongoing responsibility is to be accepted.

The Board, in outlining the above information relative to spondylolysis and spondylolisthesis conditions, concurs with its utilization for compensation purpose.

SCHEDULE D

HIGHLIGHTS OF THE MEETING—PRE-EXISTING CONDITIONS AND SECOND INJURY FUND—OCTOBER 3, 1984—2:00 P.M.

...

(1) "To go over the current original policy and understand what it was meant to say originally."

[…] indicated that it would appear that the whole section emanated from a submission made by the Railway Union, the Brotherhood of Railway Clerks in 1967.

[…] indicated that prior to Section 34.1 being implemented the Board did not accept responsibility for pre-existing conditions as per a rider the Board followed to the effect that the claim was being accepted for strain with no responsibility being assumed for any pre-existing condition. He said there were cases where a person, possibly suffering from spondylitis, would have their claim accepted on this basis but also would be informed that the surgery required by the spondylitis was being assumed as a rehabilitation measure, with no resonsibility for any PPD. […] said the Board at that time would decline responsibility for a pre-existing condition and recognize the injury as a sprain only.

[…] noted that there was also a submission made by the Brotherhood of Railway Car Men which was basically the same but worded a little differently. He said it would appear they were asking for 100% for pre-existing as well as PPD, etc. (it was noted they didn't actually come out and say this but it could be assumed).

[…] said, at that time, the doctors would say there was a pre-existing condition and the Board would not pay. In 1972 there was a lobby and in 1972 Bill 66 was put in the Act. The Act was ammended in 1972. […] said prior to this time there was nothing about pre-existing conditions in the Act—it was not commented on.

[…] said that it would appear in 1972 the MFL came up with a proposal—(possibly […]). […] said the original MFL presentation was made in 1971 to the Federation of Labour Conference.

[…] referred to a letter from [a lawyer] re Section 34.1.

[…] said the Manitoba Board Policy originated in Ontario and was adopted by the Manitoba Board in 1972.

(2) "To understand the reasons for change away from the policy over the years"

[…] asked for an explanation of how the Board is adjudicating this policy today. […] said they only use 50% and 90% relative to relievement of costs.

[…] said when the legislation was introduced the Ontario policy was dumped on the department with no discussion and that is when they started running into problems. He referred to a memo from […].

A discussion ensured (sic) as to what had happened over the years in the application of the policy and how it was applied and interpreted in different ways over those years.

(3) "To record how we are using it for adjudicaiton now"

[…] said basically today we are accepting the acute stage of the condition and once the doctor identifies that the condition has plateaued and the pre-existing condition is keeping the claimant from working, he is terminated. He said that is the way things were in 1972—before the legislation.

COST RELIEF-T.T.D.—[…] has indicated that for the past several years the Board has been applying the pre-existing policy on a very selective basis. Cost relief of 50% is considered if an employer requests cost relief to the Second Injury Fund or the claim is given consideration if the adjudicator believes the injury is of a minor nature and the pre-existing component is a major part of the disability. Generally speaking, the Board does not look at any cases until 12 weeks TTD have been paid. All cases are first referred to the Medical Department with the appropriate form and cost relief is not given unless the Medical Department agree there is a pre-existing condition that has been aggravated, enhanced or accelerated by the accident.

COST RELIEF-P.P.D.'S—[…] has indicated that in the past, the Board referered all claims that were awarded PPD's and where we had already relieved 50% of the costs to the Medical Department to review per the pre-existing policy. Generally, most claims were relieved of 90% of the entire cost of the claim including any capitalized reserves when the Medical Officer checked the appropriate box on the form. More recently, with the new personnel in the Medical Department, the Board has stopped sending them this form. The reason for this change in established procedure was because the doctors did not know how to complete the form. We then started to award 90% cost relief at the adjudicator's discretion.

REDUCTION OF P.P.D. AWARDS—We have not reduced any PPD awards because of the pre-existing component since 1980 at the adjudicator level.

[…] said the real problem seems to be the complexity of the policy [and] said the Board is not administering Section 34.1 nor are they following the policy.

[...] said it would be helpful if they had a legal definition of the word "relationship" and [...] was to look into this and if a definition is not available he will request one from our legal counsel.

Copies of the book containing information with respect to other Canadian Boards and their policies are to be provided to those attending the meeting and another meeting is to be arranged after everyone has had a chance to study this.

APPENDIX F

OCCUPATIONAL DISEASE—LEGISLATIVE OVERVIEW

I. INTRODUCTION

Each of the eleven jurisdictions of Canada will be examined individually, using in so far as possible the same three-step approach to each jurisdiction's legislation:

1. How is "industrial disease" legislatively defined?
2. What general industrial diseases are recognized, either by statute, regulation or Board policy?
3. How are industrial diseases compensated—i.e., what specific criteria must a particular case meet in order to satisfy the definition of the industrial disease in question?

The eleven jurisdictions have been themselves classified into three areas:

1. Those jurisdictions having no scheduled list of recognized industrial disease;
2. Those jurisdictions having such schedules;
3. Those jurisdictions having such schedules and which, in addition, have publicly-accessible, published statements of Board policy or decisions in this area.

The completeness of the information available for each area varies dramatically. While secondary source material certainly exists on this topic, it is unfailingly general in nature and there is a surprising lack of comparative analysis or specific information across the eleven jurisdictions.

One analysis, however, is quite comprehensive and clearly presented. This is Terence Ison's commentary in his recent (1983) book, *Workers' Compensation in Canada.*[1] Because of its value, the relevant sections of his book are appended hereto as Schedule A.

II. JURISDICTIONS WITHOUT SCHEDULES

In addition to having no schedules, these jurisdictions have no publicly-accessible, published statements of Board policy or decisions. Such specific information remains, therefore, internal and one is limited to examining the sparse, vague information available in the governing legislation itself. Thus, it is not often possible to enumerate types of recognized industrial disease nor the criteria by which they are recognized.

A. FEDERAL LEVEL

1. GOVERNMENT EMPLOYEES COMPENSATION ACT[2]

This Act, covering federal and Crown employees, does not define "industrial disease" at all. However, the scope of the Act is expressly stated to cover industrial disease as well as accidents per se: sections 2(3) and 3(1).

This is a "piggy-back" Act, so to speak; the federal government incorporates by reference the compensatory scheme and criteria of the provincial Workers Compensation Act in the province in which the federal employee works:

> S. 3.(i) Subject to this Act,
>
> **(a)** an employee who...
>
> > (ii) is disabled by reason of an industrial disease due to the nature of his employment, and
>
> **(b)** the dependents of an employee whose death results from such... industrial disease, are, notwithstanding the nature or class of such employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen...

Thus, coverage and compensation rates will vary, depending on where the federal employee is lucky or unlucky enough to work.

The *Government Employees Compensation Regulations*[3] makes plain, in Section 2 thereof, that non-industrial diseases are nevertheless compensable on the same basis, so long as the non-industrial disease "is due to the nature of his employment and peculiar to or characteristic of the particular process, trade or occupation in which he is employed at the time the disease was contracted."

Sections 3 and 6 of this Regulation (see Schedule B hereto) provide special rules for federal employees posted outside the country. Note that here what will be compensated is "any disease that results from the environmental conditions of any place outside Canada to which he was assigned" so long as the disease "is of a type that would not normally be contracted in Canada." Thus, employees abroad are covered for foreign, exotic diseases that result from the workplace, in the sense that such diseases would not be contracted but for the fact of a foreign posting, but which are not, strictly speaking, peculiar to or characteristic of the particular process, trade or occupation.

2. MERCHANT SEAMEN COMPENSATION ACT[4]

This Act catches any seamen not covered by provincial legislation or the *Government Employees Compensation Act*. This Act does not operate by means of incorporating by reference other statutes, but sets up its own "Merchant Seamen Compensation Board" and compensatory criteria.

"Industrial disease" is not given a separate definition in the Act but the term "accident" clearly encompasses industrial disease in seamen as well:

> Section 2(2):
>
> A seaman who suffers disablement arising out of and in the course of his employment as a seaman, otherwise than as a result of an accident, shall be deemed for the purposes of this Act to have suffered such disablement as a result of an accident and, except for the purpose of computing compensation, such accident shall be deemed to have taken place on the day the disablement first became known to his employer.

B. MANITOBA

1. DEFINITION OF "INDUSTRIAL DISEASE"

A standardly-vague definition is offered in s. 2(j) of *The Workers Compensation Act:* [5]

> "industrial disease" means any disease that is peculiar to, or characteristic of, an industrial process, trade or occupation to which Part I applies.

As well, section 2(1)(a) makes clear that "accident" also includes

> ...conditions in a place where an industrial process, trade, or occupation is carried on, that occasion a disease; and as a result of which a workman [sic] is disabled.

2. WHAT INDUSTRIAL DISEASES ARE RECOGNIZED?

The Act itself specifically deals with only two types of industrial diseases: silicosis (see s. 88), and occupational lesions commonly known as occupational dermatitis or occupational ulcerations and infections of the skin (see s. 90(1)).

As well, Regulation 24/77 recognizes heart attacks and carbon monoxide disability among full-time, professional fire fighters only (see Schedule C hereto).

3. CRITERIA FOR RECOGNITION AND COMPENSATION

(i) **Silicosis**: Silicosis is defined in S. 88(1) as "a fibrotic condition of the lungs caused by dust containing silica and evidenced by specific X-ray appearances or results of other scientific tests or examinations, and accompanied by a substantially lessened capacity for work."

The claim must be made no later than within two years from the date of the worker's latest examination showing him to be free from silicosis: s. 88(8). Or, it must be made within one year from the date upon which he ceases to be usually and regularly employed in an industry exposing him to silica dust: s. 88(5).

Moreover, there must be at least two years' actual exposure within Manitoba before the onset of the disablement and the worker must satisfy a minimum Manitoba residency requirement of two years next preceding his first disablement: s. 88(9).

These limitation dates may be waived at the Workers Compensation Board's discretion: s. 88(11).

No compensation may be claimed by a worker who contracted silicosis prior to May 1, 1934: s. 88(3).

If a worker meets the Manitoba exposure requirements but had prior exposure as well in another province, the compensation award will be prorated so as to reflect only the Manitoba exposure: s. 88(4).

(ii) **Occupational Dermatitis**: The Act lays down no criteria or exposure levels for this disease. It provides a deeming section to impute unfitness for employment in the special class then engaged, upon expiration of 12 months from the date of the first period of disability or medical/surgical treatment, of which there must be three: s. 90(1). Clearly, this section is designed to forcibly remove a worker from a proven hazardous work environment, for section 90(2) provides that, once deemed unfit, the worker is barred from further compensation if he remains engaged in that employment.

(iii) **Heart attack/carbon monoxide**: the criteria are contained in Schedule C, so will not be repeated here.

Note re Causation Generally:

Manitoba has an important provision which will apportion compensation where the cause of the disease lies both in the employment and in other unrelated causes (e.g. lifestyle). In other words, employment need not be the sole cause of a disease. Entitlement to compensation is preserved, although the amount of compensation will be decreased proportionally.

> Section 4(4):
>
> Where the personal injury consists of a disease, in part due to the employment and in part due to causes other than the employment, the compensation paid shall be the same proportion of the whole of the compensation that would have been payable had the personal injury been wholly due to the employment as the part of the personal injury that is due to the employment is of the whole of the personal injury.

C. SASKATCHEWAN

The Workers Compensation Act, 1979[6] neither defines nor deals specifically with industrial diseases. The definition of "injury" in the Act is broad enough to include coverage for industrial disease producing disablement:

> Section 2(k) "injury" means:
>
> (i) the results of a wilful and intentional act, not being the act of the worker;
>
> (ii) the results of a chance event occasioned by a physical or natural cause; and
>
> (iii) any disablement; arising out of and in the course of employment.

As to the nature of and criteria for disease recognized and compensated by the Board, this cannot be determined from the Act or Regulations, and any policy in this area is known internally to the Board alone.

III. JURISDICTIONS WITH SCHEDULES

Fortunately, all other jurisdictions have schedules.

The benefit of schedules lies in the presumption they produce as to causation. If a worker has the disease listed and is employed in a job involving the process correspondingly described, then the causal relationship between the two is presumed, without the need for formal proof thereof. This certainly reduces the evidentiary burden on claimants.

Of course, the presumption is rebuttable, i.e. the causal relationship is presumed unless the contrary is proved. If a cause other than employment can be proved, the presumption will be rebutted.

Industrial diseases may, of course, be recognized apart from those listed in a schedule, either by Board policy, directive or in an individual case. But here the claimant does not have the benefit of the presumption and so must lead evidence to prove the causal link.

A. PRINCE EDWARD ISLAND

1. DEFINITION OF INDUSTRIAL DISEASE

Section 1(i) of *The Workers Compensation Act*[7] states that:

> "industrial disease" means any of the diseases mentioned in the Schedule and any other disease which by the regulations is declared to be an industrial disease

2. WHAT INDUSTRIAL DISEASES ARE RECOGNIZED?

The Schedule to the Act is attached hereto as Schedule D. No further industrial diseases have been declared by regulation.

The General Regulations[8] to the Act do provide, however, that:

> Any disease peculiar to or characteristic of a particular industrial process, trade or occupation is declared to be an industrial disease in relation to employees of clinics, hospitals, laboratories or sanitoria. (Regulation 7)

As Ison rightly comments, "The meaning of that regulation is obscure."[9] It appears to say that health care workers who contract recognized industrial diseases from patients are entitled to the benefit of the presumptive schedule even though the process described in the second column is "one person removed" from the victims (my interpretation, of course, may be entirely wrong; it is a strangely worded regulation).

3. CRITERIA FOR RECOGNITION AND COMPENSATION

The Act basically provides that 12 months' exposure is required. Diseases are compensated exactly like injuries.

> Section 81(1) When a workman suffers from an industrial disease, contracted after the disease was declared to be an industrial disease, and is thereby disabled from earning full wages at the work at which he was employed, or his death is

> caused thereby and the disease is due to the nature of any employment in which he was engaged at any time within twelve months previous to the date of disablement, whether under one or more employments, the workman or his dependants are entitled to compensation as if the disease was a personal injury by accident and the disablement were the happening of the accident, subject to modification hereinafter mentioned, unless at the time of entering into the employment he had wilfully and falsely represented himself as not having previously suffered from the disease.

No compensation is payable unless the industrial disease is due to employment within the province: s. 81(2).

The Act also makes it clear that injuries which result in a disease render the disease compensable whether or not it is an "industrial" disease recognized in the Schedule: s. 81(3).

B. NEWFOUNDLAND

1. DEFINITION OF INDUSTRIAL DISEASE

Section 2(i) of *The Workers Compensation Act, 1983*[10] defines industrial disease as meaning:

> a disease prescribed under Section 78 and any other disease peculiar to or characteristic of a particular industrial process, trade or occupation.

Section 2(n) provides that "'injury'... includes an industrial disease."

2. WHAT INDUSTRIAL DISEASES ARE RECOGNIZED?

Regulation 330/83, passed pursuant to section 78(2), creates a Schedule of Industrial Diseases, attached as Schedule E hereto.

Whether the Commission has recognized, in its decisions, other types of industrial disease not listed in the Schedule, is unknown.

3. CRITERIA FOR RECOGNITION AND COMPENSATION

Diseases are compensated as if they were injuries:

S. 78(1) Where

> (a) a worker suffers from an industrial disease and is thereby disabled or his death is caused by an industrial disease, and
>
> (b) the disease is due to the nature of any employment in which he was engaged, whether under one or more employments,

the worker or his dependents are entitled to compensation as if the disease were an injury, and as if the date of disablement was the date of injury, subject to the modifications mentioned in this section, unless at the time of entering into the employment he had wilfully and falsely represented himself as not having previously suffered from the disease.

The value of the Schedule is that requirement (b), above, may be deemed to be satisfied if the worker meets both columns of the Schedule:

> S. 78(3): If a worker referred to in subsection (1) at or immediately before the date of the disablement was employed in any process prescribed and the disease contracted is the prescribed disease associated with the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.

As usual, it is a presumption which may be rebutted. Note the vagueness of the usual "Description of Process" in the Schedule: "All work involving exposure to the risk concerned." Exposure levels and duration are not specified, and Commission policy in this area is not published.

As in the PEI Act, the Newfoundland Act specifies that diseases resulting from injuries are compensable, regardless of whether the disease is industrial or not: S. 78(4).

The Act provides special rules governing victims of silicosis, carcinoma or chronic obstructive pulmonary disease who worked in fluorspar extraction at St. Lawrence, Newfoundland (s. 79). This Section is reproduced here as Schedule F.

C. NOVA SCOTIA

1. DEFINITION OF INDUSTRIAL DISEASE

The Nova Scotia *Workers Compensation Act*[11] also expands its definition of industrial disease beyond those already listed in its Schedule:

> S. 1(i) "industrial disease" means any of the diseases mentioned in Schedule A and any other disease peculiar to or characteristic of a particular industrial process, trade or occupation.

2. WHAT INDUSTRIAL DISEASES ARE RECOGNIZED?

In addition to the Schedule of industrial diseases appended hereto as Schedule G, the Act deals specifically with silicosis and pneumonoconiosis, lesser loss of lung functions, and with radiation.

3. CRITERIA FOR RECOGNITION AND COMPENSATION

(i) ***loss of lung function***: this recognition was added to the *Act* by a 1981 amendment. It applies only to coal miners, has a stringent exposure requirement, and presumably involves damage less than full-blown pneumonoconiosis:

> S. 9A: Any coal miner who has worked at the face of a mine or in similar conditions for twenty years or more and who suffers from a loss of lung function will be compensated according to his disability.

(ii) ***pneumonoconiosis***: although the Act consistently refers to this as "coal miners' pneumonoconiosis," Section 1A states that this phrase "shall mean and be deemed to mean 'pneumonoconiosis,'" i.e., liberating the application of its recognition from solely the labouring group of coal miners.

Pneumonoconiosis is defined as meaning "permanent alteration of lung structure due to the inhalation of dust and the tissue reactions of the lung to its presence": s. 74.

Silicosis and pneumonoconiosis are compensated as if they were a personal injury by accident: s. 75(1).

The worker must meet a three-year residency requirement immediately before his death or disablement: s. 79. If this residency requirement is met, and at least 50% of the exposure to silica or coal dust occurred within Nova Scotia, then the worker may claim compensation even if the remaining exposure occurred outside the province: s. 76(1). But any compensation benefits from that other province will reduce the Nova Scotia award accordingly: s. 76(2).

If the residency requirement is met, but more than 50% of the exposure occurred outside the province, compensation may still be awarded but it will be prorated to reflect the percentage of exposure occurring within Nova Scotia alone: s. 78.

A claim based on silicosis or pneumonoconiosis must be filed within five years of cessation of regular employment in the industry in which exposure occurred, *and* within one year "after it had been determined that the death or disablement resulted from silicosis or coal miners' pneumonoconiosis": s. 80(1). The limitation period does not apply to a claim for uncomplicated silicosis if the worker is resident in the province and has no out-of-province exposure, but the compensation will run only from the date of filing the claim: s. 80(2).

(iii) ***Radiation***: Death or disablement from the proximate effects of radiation overdosage will be compensated as if it were a personal injury arising out of an accident: s. 83(1).

Death or disablement resulting from the cumulative effects of radiation over an "extended period" is deemed to be an industrial disease: s. 83(2). Compensation will be apportioned to reflect the percentage of Nova Scotia exposure only: s. 83(3).

Compensation may be paid to workers exposed to radiation more than 12 months previous to the date of disablement or death: s. 83(5).

Employers using X-rays, isotopes, or any other form of radiation likely to be hazardous must make, retain and furnish to the Board exposure records of its employees: s. 85(4).

(iv) ***industrial disease generally***: exposure must occur within 12 months previous to the death/disablement (except as noted above for radiation). Industrial diseases are compensated as if they were injuries arising out of accident: s. 73(1).

> S. 73(1) Where a worker suffers from an industrial disease and is thereby disabled from earning full wages at the work at which he was employed, or his death is caused by an industrial disease and the disease is due to the nature of any employment in which he was engaged at any time within twelve months previous to the date of his disablement, whether under one or more employments, the worker or his dependents [dependants] shall be entitled to compensation as if the disease were a personal injury by accident and the disablement were the happening of the accident, subject to the modifications hereinafter mentioned unless at the time of entering into the employment he had wilfully and falsely represented himself as not having previously suffered from the disease.

The rebuttably presumptive effect of the Schedule is made clear by s. 73(2):

> S. 73(2) If the worker at or immediately before the date of the disablement was employed in any process mentioned in the second column of Schedule A hereto and the disease contracted is the disease in the first column of said Schedule set opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.

As well, there is the standard assurance that diseases stemming from compensable injuries are themselves compensable whether they are "industrial diseases" or not: s. 73(3).

D. NEW BRUNSWICK

1. DEFINITION OF INDUSTRIAL DISEASE

The *Workers Compensation Act* [12] defines industrial disease as meaning:

> any disease, which by the regulations, is declared to be an industrial disease and includes any other disease peculiar to or characteristic of a particular industrial process, trade or occupation (s. 1).

"Accident" as well is defined as including:

> disablement arising out of and in the course of employment, and where the disablement is caused by an industrial disease, the date of the accident shall be deemed to be the date of the disablement (s. 1).

2. WHAT INDUSTRIAL DISEASES ARE RECOGNIZED?

New Brunswick's Schedule is contained in Regulation 84-66, attached hereto as Schedule H.

3. CRITERIA FOR RECOGNITION AND COMPENSATION

In the fairly standard section of the Act declaring that disease will be compensated as if it were an injury due to accident, note that no minimum exposure time is set:

> 85(1) Where a worker suffers from an industrial disease and is thereby disabled or his death is caused by an industrial disease and the disease is due to the nature of any employment in which he was engaged, whether under one or more employments, the worker is or his dependents are entitled to compensation as if the disease was a personal injury by accident and the disablement was the happening of the accident, unless at the time of entering into the employment he wilfully and falsely represented himself in writing as not having previously suffered from the disease.

No compensation is payable unless the Board is satisfied that the industrial disease is due to employment within New Brunswick: s. 85(2). There are no apportionment provisions.

The standard "disease from injury" section is present: s. 85(3).

Re silicosis: There is a specific Act setting compensation rates for workers disabled or killed by silicosis contracted in New Brunswick prior to June 1, 1948. The said *Silicosis Compensation Act*[13] currently provides for monthly payments of $400 to a disabled worker and $290 to the widow(er) of a deceased worker.

E. ALBERTA

1. DEFINITION OF INDUSTRIAL DISEASE

The *Workers Compensation Act* [14] states that "accident" includes "a disabling or potentially disabling condition caused by an occupational disease" (s. 1 (1)(a)).

S. 1 (1)(s) provides that "occupational disease" means occupational disease as defined in the regulations.

Turning to Alberta Regulation 427/81, occupational disease is defined as

> (a) a disease or condition listed in Column 1 of Schedule B that is caused by employment in the industry or process listed opposite it in Column 2 of Schedule B, and
>
> (b) any other disease or condition that the Board is satisfied in a particular case is caused by employment in an industry to which the Act applies (Reg. 20(1)).

Reg. 20(2) provides that employment in the manner and circumstances set out in the said Schedule shall be deemed to be the cause of the corresponding disease or condition in the Schedule, unless the contrary be proven.

2. WHAT INDUSTRIAL DISEASES ARE RECOGNIZED?

The Schedule to Regulation 427/81 is attached hereto as Schedule I.

The Act does not list any further recognized industrial diseases.

3. CRITERIA FOR RECOGNITION AND COMPENSATION

In terms of exposure time, s. 19(6) of the Act provides merely that the worker must "at some time during the 12 months preceding the disablement" have been employed in the appropriate industry or process deemed to be the cause of the disease. If this is satisfied, the worker has the benefit of the deeming section unless rebutted.

One other provision of note concerns rehabilitation, in addition to which the Board may offer to:

> relocate a worker who suffers from an occupational disease and his dependents if in the opinion of the Board a change of industry or occupation is advisable (s. 83(1)(b)).

Note that this is solely within the Board's discretion.

F. QUEBEC

1. DEFINITION OF INDUSTRIAL DISEASES

S. 2(1)(k) of the *Workmen's Compensation Act* [15] defines "occupational disease" as meaning:

> a disease contracted out of or in the course of work and recognized by the Commission as characteristic of certain work or directly linked with the specific risks of certain work.

2. WHAT INDUSTRIAL DISEASES ARE RECOGNIZED?

In addition to those diseases recognized in Schedule D to the Act itself, a further Schedule in Regulation O.C. 2870-81 recognizes a longer list of occupational diseases. Both Schedules are attached hereto as Schedule J.

3. CRITERIA FOR RECOGNITION AND COMPENSATION

Occupational diseases are compensated as if they were bodily injuries caused by accidents: s. 111(1). The claim must be brought within six months of the date of diagnosis or death, as the case may be: s. 111(1).

The worker must meet a three-year residency requirement, unless employment within Quebec is the sole cause of the disease: s. 111(8).

The presumptive benefit of the Schedules is set out in s. 111(8) as well, together with the statutory burdens of proof in cases not falling within the Schedules.

> S. 111(8) **Presumption**. If the worker, at or immediately before the date of the disablement, was employed in any process mentioned in the second column of Schedule D or in the regulations, and the disease contracted is the disease in the first column of the schedule or of the regulations opposite to the description of such process, the disease is deemed to have been due to the nature of that process unless the contrary is proved.

In the other cases, it must be established to the satisfaction of the Commission that the disease was caused by the nature of the process in which the worker was employed.

But no benefit is payable under this act unless the worker has been a resident of Quebec for the three years preceding his claim, except where the Commission is satisfied that the disease is not due to any other cause than his employment within Quebec.

> S. 111(9) **Disease not provided for**. In the case of a disease not provided for in Schedule D or the regulations, this section applies if the beneficiary establishes, to the satisfaction of the Commission, that the disease was contracted out of or in the course of work done by the worker for an employer and that it is characteristic of that work or directly linked to the particular risks thereof.

(i) ***pneumoconiosis***: s. 112 provides definitions in this area:

> 112. In this act:
>
> (1) **pneumoconiosis**. the word, "pneumoconiosis" shall mean a pathological condition of the lungs, due to breathing air containing

> siliceous dust and characterized anatomically by generalized fibrous changes in both lungs; such word includes, especially, the diseases known under the names of "silicosis" and asbestos" (sic);
> (2) **siliceous dust**. the expression "siliceous dust" shall mean silica dust or other compounds of silicon, including asbestos.

Pneumoconiosis claims have a special limitation period; if a worker ceases to be "ordinarily and regularly" employed in an industry exposing him to siliceous dust, he must both file and prove his claim within five years of leaving such employment or else his claim will be forfeit. The Commission does, however, have the discretion to receive claims after the deadline "if it considers that justice demands it": s. 113.

There is a separate Act, administered by the Commission de la sante et de la securite du travail (Health and Safety Commission), governing compensation rates for permanently disabled victims of asbestosis and silicosis in (basically) the mining industry. This Act, attached as Schedule K hereto, provides both for a lump sum payment based on a "meat chart" of degree of impairment, and for a complementary pension equivalent to 90% of disposable net income. This latter is tied in to the maximum earnings ceiling found in the *Workmen's Compensation Act* (see s. 3).

IV. JURISDICTIONS HAVING BOTH SCHEDULES AND PUBLISHED STATEMENTS OF BOARD POLICY

A. ONTARIO

1. DEFINITION OF INDUSTRIAL DISEASE

S. 1(1)(n) of the *Workers Compensation Act* [16] states that:

> **"industrial disease"** includes,
> (i) a disease resulting from exposure to a substance relating to a particular process, a trade or occupation in an industry,
> (ii) a disease peculiar to or characteristic of a particular industrial process, trade or occupation,
> (iii) a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an industrial disease, or
> (iv) any of the diseases mentioned in Schedule 3 or 4.

The definition is noteworthy in its unusual note of concern for preventative measures.

The Act also specifically defines silicosis as "a fibrotic condition of the lungs sufficient to produce a lessened capacity for work, caused by the inhalation of silica dust": s. 1(1)(x).

2. WHAT INDUSTRIAL DISEASES ARE RECOGNIZED?

Schedule 3 of General Regulation 951 [17] is attached hereto as Schedule L. There is no "Schedule 4" that I could find.

Of course, in addition to the Scheduled Diseases, the Ontario Board has recognized other conditions as compensable diseases in its decisions and directives. Specific, detailed criteria for compensation (exposure levels, duration, etc.) have also been enunciated.

Attached as Schedule M hereto are the Industrial Disease Directives as published by the Board in its *Board Policies and Administrative Directives* (1979).

Rather than merely repeat what you may read in the original, I am instead providing an index to the various Directives contained in Schedule M. [All page numbers refer to the original Manual.]

—*Directive #1* (p. 178): approved interpretation of presumptive effect of Schedule.

—*Directive #2* (p. 178): re respiratory cancer due to exposure to arsenic or cobalt dust in the plant of Deloro Smelting and Refining Company.

—*Directive #3* (p. 179): re nasal sinus and lung carcinoma at Port Colborne mine of INCO.

—*Directive #4* (p. 180): re carcinoma of the lung and sinus cancer at the Sinter plant at Copper Cliff smelter.

—*Directive #5* (p. 180): re lung cancer in asbestos workers generally.

—*Directive #6* (p. 180A): re mesothelioma in asbestos workers generally.

—*Directive #7* (p. 180A): re lung cancer in coke oven workers generally.

—*Directive #8* (p. 180B): re lung cancer in underground uranium miners generally.

—*Directive #9* (p. 180C): re gastrointestinal cancer in asbestos workers generally.

—*Directive #10* (p. 181): re claims for resistant staphylococcus infections generally.

—*Directive #11* (p. 181): procedure re claims for allergic respiratory illness generally.

—*Directive #12* (p. 182): re polio generally.

—*Directive #13* (p. 184): Policy statement re "disability" and communicable diseases.

—*Directive #13A* (p. 184): re reactions to compulsory immunization procedures.

—*Directive #13B*(p. 184A): re entitlement to tetanus shots.

—*Directive #13C* (p. 184B): re entitlement to disease-preventing shots.

—*Directive #14* (p. 185): re T.D.I. exposure generally.

—*Directive #15* (p. 187): procedure re chest and respiratory disability from T.D.I. exposure.

—*Directive #16* (p. 187): re vibration-induced white finger disease generally.

—*Directive #17* (p. 187B): re laryngeal cancer from asbestos and nickel exposure generally.

—*Schedule Directive* (p. 188): re long-delayed bone changes and Caisson Disease generally.

—*Schedule Directive* (p. 189): re psoriasis generally and re occupational dermatitis generally.

—*Schedule Directive* (p. 192): re pension awards in pneumoconiosis claims, and re procedure in silicosis and pneumoconiosis claims.

—*Schedule Directive* (p. 194): re silicosis and radiation at Elliot Lake.

3. CRITERIA FOR RECOGNITION AND COMPENSATION

Ontario has the standard section providing that diseases are compensated in the same manner as injuries:

> 122(1) **Industrial diseases to be deemed accidents.** Where an employee suffers from an industrial disease and is thereby disabled or his death is caused by an industrial disease and the disease is due to the nature of any employment in which he was engaged, whether under one or more employments, the employee is or his dependants are entitled to compensation as if the disease was a personal injury by accident and the disablement was the happening of the accident, subject to the modifications hereinafter mentioned or contained in the regulations, unless at the time of entering into the employment he has wilfully and falsely represented himself in writing as not having previously suffered from the disease.

If the claimant is no longer employed in the trade causing the disease, the Board may impute an annual income "at an amount that it considers fair and equitable having regard to the average earnings of a fully qualified person engaged in the same trade... during the 12 months prior to the commencement of disability": s. 122(6). Of course, the ceiling still applies.

The difference between Schedule 3 and Schedule 4 is in the nature of the presumption of causation: Schedule 3 produces a rebuttable presumption (s. 122(9)) but Schedule 4 produces an irrebuttable presumption that cannot be challenged (s. 122(9a)).

In regard to silicosis, s. 122(11) provides that the worker must have been actually exposed to silica dust within Ontario for periods amounting to at least two years preceding his disablement. This applies as well to pneumoconiosis and stone worker's or grinder's phthisis: s. 122(15)

An important, recent (1984) development is the creation of the "Industrial Disease Standards Panel." Its function is:

> (a) to investigate possible industrial diseases;
>
> (b) to make findings as to whether a probable connection exists between a disease and an industrial process, trade or occupation in Ontario;
>
> (c) to create, develop and revise criteria for the evaluation of claims respecting industrial disease; and
>
> (d) to advise on eligibility rules regarding compensation for claims respecting industrial disease.
>
> (s. 86 p)

Section 86 p is attached hereto in its entirety as Schedule N.

B. BRITISH COLUMBIA

The Workers' Compensation Board of B.C. has an outstanding summary of Industrial Disease compensation in that province in its *Rehabilitation Services* *and Claims Manual* (1984). It brings together in a comprehensive and orderly manner the relevant provisions of the *Workers Compensation Act*;[18] Board policies, decisions and directives; and commentary on same.

Since any summary I could produce would be but a pale reflection of the B.C. *Manual*, the relevent chapter of the *Manual* is appended hereto as Schedule P, and an index to it for easy reference follows shortly.

Schedules B, C, and D to the Act are attached hereto as Schedule O.

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FOOTNOTES

1. Ison, Terence G. *Workers' Compensation in Canada* (Toronto: Butterworths, 1983), pp. 26–27, 15–17, 28–37.
2. R.S.C. 1970, Chap. G-8, as amended.
3. C.R.C. 1978, Chap. 880.
4. R.S.C. 1970, chap. M-11, as amended.
5. R.S.M. 1970, Ch. W200, as amended.
6. S.S. 1979, Ch. W-17.1, as amended.
7. R.S.P.E.I. 1974, Ch. W-10, as amended.
8. PEI Reg. EC 946/78.
9. *Supra*, n.1, p.33.
10. S.N. 1983, c. 48, as amended.
11. R.S.N.S. 1967, Ch. 343, as amended.
12. R.S.N.B. 1973, Ch. W-13, as amended.
13. R.S.N.B. 1973, Ch. S-9, as amended. Rate is set by Regulation 84-288.
14. R.S.A. 1980, Ch. W-16, as amended.
15. R.S.Q.c. A-3, as amended.
16. R.S.O. 1980, c. 539, as amended.
17. R.R.O. 1980, Reg. 951.
18. R.S.B.C. 1979, Chap. 437, as amended.

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37. Distinction between injury and disease. There are no exclusive definitions used by the boards to distinguish injury from disease. Sometimes, assistance may be derived from the definitions section of the Act, or from the schedule of industrial diseases. For the most part, however, the distinction between injury and disease rests on conventional practice.

38. Injury. The disabilities most commonly classified as injuries are those involving physiological changes induced by trauma. The term injury can, however, include a disability resulting from activity over time as well as one resulting from a specific incident. For example, a soft tissue disablement suffered by a stenographer after prolonged operation of an embossing machine was classified as a compensable injury.[1]

The following are examples of disorders that have been classified as injuries:

1. Any wound (including any infection of the wound).
2. Fractures.
3. Any other disorder caused by trauma.
4. Any disorder caused by explosion (including hearing loss).
5. Sprains and strains, whether caused by a specific incident or by activity over time.
6. A damaged cartilage or ligament. It makes no difference whether the disability resulted from one major incident or a series of incidents or activity.
7. A dislocation of the bones at a joint. Again, it makes no difference whether it happened in one incident or in a series of incidents or activity.
8. Burns caused by a single incident of a chemical spilled on the skin.[2]

39. Diseases. The following are examples of disabilities that have been classified as diseases:

1. A disability caused by the gradual absorption of a chemical through the skin, by inhalation, or otherwise.
2. An infection (except when it is incidental to a compensable injury, when it is treated as part of the injury).
3. Hearing loss caused by exposure to noise over time, or by infection.
4. Osteoarthritis.
5. A disablement resulting from exposure to vibrations over time.
6. Contagious diseases.
7. Allergic reactions.[3]

In Alberta, the definition of a compensable accident includes a disabling or potentially disabling condition caused by an occupational disease.[4]

40. Mental disorder. Compensation is payable for mental as well as physical disorders. Hence it is not a bar to compensation that a disability is psychological. There is, however, a perceptible reluctance to accept claims for psychological harm, or to award permanent benefits for psychological disability.[5]

...

(4) DISEASES

(i) Definition and Recognition

65. Disease. In British Columbia, the term disease is defined to include any disablement resulting from exposure to contamination.[35] Otherwise there is no definition of "disease" in the Acts. The distinction between injury and disease is illustrated in paragraphs 37 to 39. [see above]

66. Disease resulting from injury. A disablement by disease resulting from a compensable injury is treated as part of the injury, and is compensable without reference to any provisions of the Act relating to industrial disease. In Ontario, New Brunswick, and Newfoundland, the Acts provide that nothing in the industrial diseases section of the Act affects the right of a worker to compensation in respect of a disease to which that section does not apply if the disease is a result of an injury in respect of which he is entitled to compensation.[36] The same principle applies in other jurisdictions. For example, multiple sclerosis is not generally recognized as an industrial disease, but if its onset is triggered by a traumatic experience in the course of employment, it is compensable as a consequence of the injury.[37]

67. Included in definition of injury. In some jurisdictions, disease is included in the definition of injury or accident.[38] In those jurisdictions, the same rules apply to all disabilities unless otherwise stated.

68. Recognition. In jurisdictions where disease is not included in the definition of injury or accident, a disease is potentially compensable if it is of a type that is recognized as an industrial (occupational) disease. It may be recognized as such in the Act or Regulations, or by determination of the Board.[39] A disease not previously recognized may be recognized when a claim is made.

In some jurisdictions, recognition means simply an acceptance by the Baord that the disease is one that might be caused by employment, and that there is no policy objection to the disease being compensable.[40]

Some jurisdictions have required that where a disease is not mentioned in a presumptive schedule, it must be one that is peculiar to or characteristic of a particular industrial process, trade or occupation in order to be recognized as an industrial disease.[41] There is, however, a trend in favour of compensation for any disease resulting from employment. Consequently, where that restriction has not been repealed, it has tended to lose its restrictive effect.

69. Diseases recognized. Diseases that have been recognized in one or more jurisdictions as industrial diseases include:

Ankylostomiasis (NS, Nfld.)
Anthrax (Alta., Ont., Que., NB, PEI, Nfld.)
Asbestosis (BC, Alta., Ont., Que., Nfld.)
Asthma (BC)
Blisters, infected (Ont., Que., PEI, Nfld.)
Bronchitis (BC)
Brucellosis (undulant fever) (BC, Que., NB, PEI)
Bursitis (including Miners' Beat Elbow) (BC, Ont., Que., NB, NS, PEI, Nfld.)
Caisson Disease (Compression/Decompression Sickness) (BC, Ont., Que., NB, Nfld.)
Cancers
- Angiosarcoma of the liver (BC)
- Epithelial lining of urinary bladder, ureter or renal pelvis, primary (BC)
- Gastrointestinal/stomach (BC, Nfld.)
- Larynx or pharnyx, associated with asbestosis (BC)
- Lung, primary (BC, Ont.)
- Lung, associated with asbestosis (BC, Nfld.)
- Mesothelioma (BC)
- Mucous lining of nose or nasal sinus (BC)
- Skin, primary (BC, Ont., NS, PEI., Nfld.)

Cellulitis (subcutaneous) of the hand (Miner's Beat Hand) (Alta., NS, Nfld.)
Cellulitis (subcutaneous) over the patella (Miners' Beat Knee) (Nfld.)
Chicken Pox (BC)
Conjunctivitis (BC, NB, PEI)
Corneal surface of eye, ulceration of (Ont.)
Dermatitis, contact (BC)
Dermatitis, simple (Man., Que., Nfld.)
Dermatitis venenata (Ont., NS, PEI)
Emphysema (BC, Ont.)
External allergic alveolitis (farmer's lung) (BC, Que.)
Fluorosis (BC)
Food poisoning (BC)
Frostbite (Ont., NS, PEI, Nfld.)
Giardia lamblia infection (BC)
Glanders (Alta., NB)
Heart attack or heart disease (BC, Man.)
Hepatitis, infectious (BC)
Hepatitis, serum (BC)
Hepatitis, viral (Que.)
Immunization, diseases resulting from (Ont.)
Incisor teeth, erosion of by acid or fumes (BC)
Industiral deafness, tinnitus and other hearing loss (BC, Ont., Que., PEI, Nfld.)
Infection from handling sugar (NB)
Infection or inflammation of the skin (Alta.)
Keratitis (BC)
Lung disease, chronic obstructive (C.O.L.D.) (Ont.)
Meningitis (BC)
Metal fume fever (BC)
Mononucleosis (BC)
Mumps (BC)
Phthisis, stone workers' or grinders' (Ont., Nfld.)
Pneumoconiosis (including Coal Miner's Pneumoconiosis) (BC, Alta., Ont., Que., NB, NS, Nfld.)
Poisoning, caused by
- ammonia (NB, PEI)
- arsenic or arsine (all provinces except Sask. and Man.)
- benzol, nitor and derivatives (Alta., Ont., Que., Nfld.)
- beryllium (Ont.)
- brass, nickel or zinc (Ont., Que., NB, Nfld.)
- cadmium (BC, Ont., Que.)
- carbon bisulphate/carbon bisulphide (Ont., NB, PEI, Nfld.)
- carbon dioxide (Ont., Nfld.)
- carbon monoxide (BC, Man., Ont., Que., NB, NS, Nfld.)
- carbonic acid gas (NB)
- chemicals used in the painting industry (NB)
- chlorinated hyrocarbons (Ont., Que.)
- chrome (Ont., Que., Nfld.)
- hydrogen sulphide (BC)
- lead (all provinces except Sask. and Man.)
- manganese (BC)
- mercury (all provinces except Sask. and Man.)
- nitrites and hydrogen cyanide (BC)
- nitrous fumes (BC, Ont., Que., Nfld.)
- organic solvents (BC)
- phosgene (BC)
- phosphorous and its compounds (all provinces except Sask. and Man.)
- sulphur (NB, PEI)
- other toxic substances (BC, Ont.)

Psittacosis infections (BC)
Radiation-caused illnesses (BC, Ont., Que., NS. Nfld.)
Respiratory irritations (BC, Ont.)
Retinitis due to welding (Ont., Que., NB, PEI, Nfld.)
Ringworm (BC)
Rubella (BC)
Salmonella infections (BC)
Scabies (BC)
Seal finger (Nfld.)
Shigellosis (BC)
Silicosis (all provinces)
Staphylococcus infections (BC)
Streptococcus infections (BC)
Tendinitis (BC)
Tenosynovitis (BC, Ont., Que., NS, Nfld.)
Tuberculosis (BC, Ont., Que.)
Typhoid (BC)
Vascular disturbances of the extremities (BC)

Vibrations, disablement from (including White Hand Syndrome) (BC, Ont., Que.)
Warts on the hands (Que.)
Whooping cough (BC).[42]

70. Stress. The policy considerations relevant to recognition of an industrial disease may vary in weight according to the gravity of disablement. Thus in one case, the Board declined to recognize a disablement from exhaustion as an industrial disease.[43] In that case, however, the exhaustion was the only disablement, and much of the reasoning related to its transitory nature. A different view might well be taken where stress results in a permanent disablement or death.[44]

71. Alcoholism. Whether alcoholism should be recognized as an industrial disease is currently under discussion. In a case involving a miner who was alleged to have become an alcoholic in a mining camp, the Board declined to recognize alcoholism as an industrial disease.[45] However, it is difficult to see how the same view could be taken in a case that is stronger on the facts; for example, a brewery worker who is supplied with free beer by the employer and encouraged or permitted to drink while at work.

(ii) Causation

72. General principles. In jurisdictions where disease is included in the definition of injury or accident, a disease is compensable if it is one arising out of and in the course of the employment (except that for Quebec, see paragraph 49). In other jurisdictions, a disease is compensable if it is due to the nature of any employment in which the worker was employed.[46] The significance of this distinction can be illustrated by an influenza epidemic that affects the population at large and where it appears that, on the balance of probabilities, a worker has contracted the influenza through his exposure to others at work. The disease was not due to the nature of his employment, though it is one arising out of and in the course of the employment. In those jurisdictions where disease is included in the definition of injury or accident, therefore, this case is compensable.

73. Determination of cause. As in injury cases, the cause of a disease is determinable by reference to the evidence and the most likely inferences that can be drawn from the evidence.[47] There are, however, presumptive schedules and other presumptions mentioned below. Presumptions that apply only in fatal cases are described in paragraph 87.

75. Presumptive schedules. In most jurisdictions, a schedule of industrial diseases is included in the Act, or in regulations.[48] The schedule is in two columns. The first is a list of diseases. Opposite each disease there appears in the second column the type of industry or process that has been known to cause that type of disease. The schedule serves two purposes. First, the mention of a disease in the schedule establishes that it has been recognized as an industrial disease. Secondly, if a worker who has a disease in the first column was engaged in an industry shown opposite that disease in the second column, it is presumed that the disease resulted from industrial exposure unless the contrary is proved.[49] It is unlawful for a board to impose any additional requirement before applying the presumption.[50]

Where a disease is not listed in the schedule, or where column two of the schedule does not apply, the Board must enquire and determine from the evidence, including the circumstantial evidence, whether the employment exposure was likely to have contributed to the disease, or whether it was more likely to have resulted entirely from other causes.

75. Other presumptions. In the Northwest Territories, the Ordinance provides that where, during the twelve months preceding the disablement, a worker was employed in an industry where he was exposed to conditions that might reasonably have caused a disease, the disease shall be deemed to have been due to the nature of the employment unless the contrary is proved.[51] In Manitoba, where there is no presumptive schedule, there are presumptions in favour of firefighters with regard to disabilities affecting the heart, lungs, brain or kidneys.[52] In Prince Edward Island, the Regulations provide that any disease peculiar to or characteristic of a particular industrial process, trade or occupation is declared to be an industrial disease in relation to employees of clinics, hospitals, laboratories or sanitoria.[53] The meaning of that regulation is obscure.

76. Contamination levels. Where a disease is one that may have resulted from airborne contamination, or other contamination, it is not a requirement for compensation that the level of contamination should have exceeded any maximum prescribed in any occupational health or safety regulations.

77. Radiation. In Nova Scotia, where a worker has been disabled or his death has been caused by the proximate effects of radiation overdosage, the worker or his dependants are entitled to the benefits as if the overdosage were a personal injury by accident and the disablement or death were the happening of the accident.[54] This provision is not limited to exposures resulting from employment.

77a. Coal miners. In Nova Scotia, any coal miner who has worked at the face of a mine or in similar conditions for twenty years or more and who suffers from a loss of lung function must be compensated according to his disability.[55] Evidence of causation is not required and evidence of an alternative cause would be irrelevant.

(iii) Disabled From Earning Full Wages

78. Wage loss. In jurisdictions where disease is included in the definition of injury or accident, the benefits payable are generally the same as for an injury. In some other jurisdictions, medical aid is payable on the same basis as in injury cases, but entitlement to periodic payments of compensation depends upon the claimant being disabled by the disease from earning full wages at the work at which he was employed.[56] In these jurisdictions, disablement from industrial disease is an economic rather than a physical concept. Though there may be physical impairment, wage loss and pension benefits are not payable until the impact of the disease requires the worker to withdraw from employment, or to take a lower paying job. Thus if he retains his former employment until the normal retirement age, no periodic payments of compensation are made. Conversely, compensation may be payable in a case of industrial disease though there be no physical impairment. For example, in one case a hospital worker sustained a staphylococcal infection that made her a carrier of the disease. She experienced no physical impairment, but she was precluded from working to prevent the infection of others, particularly patients at the hospital. She was, therefore, disabled from earning full wages at the work at which she was employed, and entitled to compensation.[57]

(iv) Silicosis

79. Silicosis. Some Acts have sections dealing specifically with benefits for silicosis,[58] and some include related lung diseases. Those sections operate independently of the general provisions relating to industrial disease. In other jurisdictions, silicosis is covered in the same manner as other industrial disease.[59]

(v) Latency Periods and Time Limits

80. Time limits. This subject involves an unfortunate conflict between rules of law and those of natural science. Many of the more serious industrial diseases, such as pneumoconiosis, asbestosis, and cancer, involve a substantial latency period; i.e., the interval between exposure to the causative agent and the disabling manifestation of the disease. Latency periods for these diseases are typically in the range of 10 to 25 years. The Acts, however, anticipate disablement from disease as an immediate consequence of exposure. For example, in most jurisdictions that have a presumptive schedule, the presumption only applies where the worker was employed in the listed industry or process at or immediately before the date of the disablement.[60] In Alberta, the presumption applies if the worker was engaged in the listed process within 12 months preceding the disablement.[61] Some other provisions not only curtail the presumption but limit claims for industrial disease to cases where the disablement was due to the nature of any employment in which the worker was employed within 12 months preceding the disablement.[62]

These time limits have been mitigated by being overlooked or ignored, or interpreted as inapplicable, and the contemporary trend is toward their repeal.

The time limits mentioned above are those that apply only to claims for industrial disease. The time limits that apply to all claims are explained in paragraph 324.

81. Date of disablement. The Acts typically provide that in disease cases, the date of disablement is deemed to be the occurrence of the injury.[63] This is used to establish the termination date or commencement date of the various limitations periods in the Acts. It is also used to determine which amendments to the Act apply to the claim, and what benefit levels apply.

(5) HEARING LOSS

82. Hearing loss. Compensation for loss of hearing may be payable under three provisions. First, traumatic hearing loss, for example, deafness caused by an explosion, is traditionally compensable as an injury. Secondly, non-traumatic hearing loss, for example, deafness caused by exposure to noise over a prolonged period, is traditionaly classified as an industrial disease.[64] Thirdly, in British Columbia there is a separate provision for the compensation of non-traumatic hearing loss arising out of and in the course of employment.[65]

(6) DEATH

83. General principle. Death benefits are payable where the death of a worker was caused by a compensable injury or disease. There is no requirement that the death be immediate, or that it must occur within any fixed period of the injury or onset of disease.

84. Compensation regardless of the cause of death. In Ontario, a dependant of a worker who was, at the time of his or her death, in receipt of an award for permanent disability which the Board had rated at 100 per cent or, but for his or her death would have been in receipt of an award for permanent disability at the rate of 100 per cent, is entitled to compensation as if the death of the worker had resulted from the compensable disability for which he or she received or would have received the permanent disability award.[66]

In Nova Scotia, where a worker dies and at the time of his death was in receipt of compensation, his dependants must receive (in addition to any benefits that may be payable if the death resulted from the employment) an amount equal to three times the monthly payment that would have been payable to the worker if he were alive.[67] If the worker was in receipt of compensation for permanent total disability, his dependant must receive a further amount equal to nine times the monthly payment that would have been payable to the worker if he were alive.[68]

In New Brunswick, where a worker dies before attaining age sixty-five, any amount set aside in the reserves of the Board for the purpose of providing a worker with a pension at age sixty-five, together with accrued interest, must be divided equally among the surviving dependants of the worker; but where a spouse has the care of a dependent child of the worker, that child's share must be given to the spouse, and where the worker has no surviving dependants, the amount set aside must remain in the pension fund.[69]

85. Lung diseases. In British Columbia, where a deceased worker was, at the date of his death, under the age of 70 years and suffering from an industrial disease of a type that impairs the capacity or function of the lungs, and where the death was caused by some ailment or impairment of the lungs or heart of non-traumatic origin, it is conclusively presumed that the death resulted from the industrial disease.[70]

86. Paraplegia. In Nova Scotia, where permanent total disability results in a paraplegic condition, there is a presumption that on the death of the claimant, the death resulted from the compensable disability.[71] That presumption is irrebuttable.

87. Presumptions. In Alberta, Saskatchewan, the Yukon and Northwest Territories, if a worker is found dead at a place where he had a right to be in the course of his employment it is presumed that his death was the result of an injury arising out of and in the course of his employment.[72] In Alberta, the Yukon and Northwest Territories, that presumption is rebuttable by evidence, but it is not stated to be rebuttable in Saskatchewan.

In Nova Scotia, when a worker is found dead in the underground workings of a coal mine, it is presumed that his death was the result of personal injury by accident, arising out of and in the course of his employment, unless there is sufficient evidence to rebut the presumption.[73]

In Newfoundland, where a worker is found dead in the underground workings of a mine at a place where he had a right in the course of his employment to be, it is presumed that his death was the result of personal injury by accident arising out of and in the course of his employment, unless there is evidence sufficient to rebut the presumption.[74]

FOOTNOTES

1. *Workmen's Compensation Board v. Theed*, [1940] SCR 553.
2. *Decision No. 129*, (1975) 2 Workers' Compensation Reporter 127.
3. *Ibid.*
4. *Workers' Compensation Act*, SA 1981, c. W-16, s. 1(1)(a).
5. See also *Adjudication Branch Manual*, Workers' Compensation Board of Ontario, Document No. 33-21-01, 11 and 31, July 1979.

...

35 *Workers' Compensation Act*, RSBC 1979, c. 437, s. 1, "industrial disease".

36 *Workers' Compensation Acts,* RSO 1980, c. 536, s.122(14); RSNB 1973, c. W-13, s. 85(3); RSN 1970, c. 403, s. 93(4).

37 *Decision No. 228*, (1977) 3 Workers' Compensation Reporter 74.

38 For example, *Workers' Compensation Act,* SA 1981, c. W-16, s. 1(1)(a); *Workers' Compensation Act*, SS 1979, c. W-17.1, s. 2(k).

39 For example, *Workers' Compensation Act*, RSBC 1979, c. 437, s. 1; *Workers' Compensation Act,* RSPEI 1974, c. W-10, s. 1(i) and schedule.

40 For example, *Decision No. 128*, (1975) 2 Workers' Compensation Reporter 126. See also *Decision No. 326*, (1980) 5 Workers' Compensation Reporter 78.

41 For example, *Workers' Compensation Act*, RSO 1980, c. 539, s. 1(1)(n); *Workers' Compensation Act,* CSNS 1979, c. W-10, s. 1(1)(i).

42 British Columbia: *Workers' Compensation Act,* RSBC 1979, c. 437, Schedule B; *Decision No. 93*, (1975) 2 Workers' Compensation Reporter 4; *Decision No. 128*, (1975) 2 Workers' Compensation Reporter 126.
Alberta: *General Regulations,* Alta. Reg. 362/73, reg. 14 as amended.
Manitoba: *Workers' Compensation Act*, RSM 1970, c. W 200, ss. 88(2) and 90.
Ontario: *General Regulations,* RRO 1980, reg. 951, Schedule 3; *Claims Adjudication Branch Procedures Manual,* Workers' Compensation Board of Ontario, Document Nos. 33-13-01 to 33-13-16.
Quebec: *Workers' Compensation Act,* SQ 1978, c. 57, Schedule D; *Regulation Respecting Occupational Diseases,* OC 2870-81, (1981) 113 GO 11 3465.
New Brunswick: *Workers' Compensation Regulations*, Reg. 67-13 r. 14.
Nova Scotia: *Workers' Compensation Act*, CSNS 1979, c. W-10. Schedule A.
Prince Edward Island: *Workers' Compensation Act,* RSPEI 1974, c. W-10, Schedule A.
Newfoundland: *Workers' Compensation Act,* RSN 1970, c. 403, Schedule; 1978, c. 68, s. 17.

43 *Decision No. 102*, (1975) 2 Workers' Compensation Reporter 25.

44 For example, *Oklahoma City v. Schoonover, Okl.* (1975) 535 P. (2d) 688.

45 *Decision No. 348*, Workers' Compensation Reporter, 25th February 1982. In that case, the Board decided that (apart from recognition as an industrial disease) alcoholism failed to qualify as a "disease". The reasons given for that view, however, are not convincing.

46 For example, *Workers' Compensation Act*, RSBC 1979, c. 437, s. 6(1)(b); *Workers' Compensation Act*, CSNS 1979, c. W-10, s. 73(1).

47 For a discussion of some of the problems involved in this, see *The Dimensions of Industrial Disease*, T.G. Ison, 1978, Industrial Relations Centre, Queen's University, pp. 12-21.

48 For example, *Workers' Compensation Regulations*, Alta. Reg. 427/81, reg. 20 and Schedule B; *Workers' Compensation Act*, SQ 1978, c. 57, schedule D.

49 *Workers' Compensation Act*, SA 1981, c. W-16, s. 19(6); *Workers' Compensation Act*, RSQ 1977, c. A-3, s. 111(8).

50 *Evans v. Workers' Compensation Board*, (1982) 138 DLR (3d) 346.

51 *Workers' Compensation Ordinance*, ONWT 1977 (1st), c. 7, s. 14(5).

52 *Fire Fighters Regulation*, Man. Reg. 24/77.

53 *Workers' Compensation Regulation*, PEI Reg. EC946/78, reg. 7.

54 *Workers' Compensation Act*, CSNS 1979, c. W-10, s. 83(1).

55 *Workers' Compensation Act*, CSNS 1979, c. W-10, s. 9A.

56 For example, *Workers' Compensation Act*, RSPEI 1974, c. W-10, s. 81(1); *Workers' Compensation Act*, RSN 1970, c. 403, s. 93(1).

57 *Decision No. 150*, (1975) 2 Workers' Compensation Reporter 183. See also *Policies and Administrative Directives Manual*, Workers' Compensation Board of Ontario, Directive 13, relating to s. 118(1), 2nd June 1978.

58 *Workers' Compensation Acts*, RSBC 1979, c. 437, s. 6(7), (8) and (9); RSM 1970, c. W 200, s. 88; CSNS 1979, c. W-10, ss. 75-82.

59 *Workers' Compensation Acts*, SS 1979, c. W-17.1, s. 28; RSO 1980, c. 539, s. 122; RSQ 1977, c. A-3, ss. 111-113; RSNB 1973, c. W-13, s. 85; 1980 c. 56, s. 16; RSPEI 1974, c. W-10, s. 81; RSN 1970, c. 403, s. 93.

60 For example, *Workers' Compensation Act*, RSQ 1977, c. A-3, s. 111(8); *Workers' Compensation Act*, CSNS 1979, c. W-10, s. 73(2). These restrictions appear to have been inserted by mistake.

61 *Workers' Compensation Act*, SA 1981, c. W-16, s. 19(6).

62 *Workers' Compensation Act*, CSNS 1979, c. W-10, s. 73(1).

63 For example, *Workers' Compensation Act*, SA 1981 c. W-16, s. 19(7); *Workers' Compensation Ordinance*, COYT 1976, c. W-5, s. 2(1)(c), "accident".

64 For example, *Workers' Compensation Act*, RSQ 1977, c. A-3, schedule D(12); 1978, c. 57, s. 72; *Workers' Compensation Amendment Act*, SN 1978, c. 68, s. 17(1), amending the schedule.

65 *Workers' Compensation Act*, RSBC 1979, c. 437, s.7.

66 *Workers' Compensation Act*, RSO 1980, c. 539, s. 43(7).

67 *Workers' Compensation Act*, CSNS 1979, c. W-10, s. 31A(1).

68 *Ibid.*, s. 31A(2).

69 *Workers' Compensation Act*, RSNB 1973, c. W-13, s. 38.3(6).

70 *Workers' Compensation Act*, RSBC 1979, c. 437, s. 6(11). The Revised Statutes use the phrase "capacity of function" but that is one of the copying errors introduced by the Revised Statutes.

71 *Workers' Compensation Act*, CSNS 1979, c. W-10, s. 36(5).

72 *Workers' Compensation Acts*, SA 1981, c. W-16, s. 19(3); SS 1979, c. W-17.1, s. 30; COYT 1976, c. W-5, s. 7(3); ONWT 1977 (1st) c. 7, s. 14(2).

73 *Workers' Compensation Act*, CSNS 1979, c. W-10, s. 9.

74 *Workers' Compensation Act*, RSN 1970, c. 403, s.6(3).

CHAPTER 880

GOVERNMENT EMPLOYEES COMPENSATION ACT

Government Employees Compensation Regulations

REGULATIONS MADE UNDER THE GOVERNMENT EMPLOYEES COMPENSATION ACT

Short Title

1. These Regulations may be cited as the *Government Employees Compensation Regulations.*

Compensation to Employee or Dependants

2. An employee who is disabled by reason of a disease that is not an industrial disease but is due to the nature of his employment and peculiar to or characteristic of the particular process, trade or occupation in which he is employed at the time the disease was contracted and the dependants of a deceased employee whose death is caused by reason of such a disease, are entitled to receive compensation at the same rate as they would be entitled to receive under the *Government Employees Compensation Act* if the disease were an industrial disease, and the right to and the amount of such compensation shall be determined by the same board, officers or authorities and in the same manner as if the disease were an industrial disease.

3. (1) Any employee, except an employee engaged locally outside Canada, who is disabled by reason of any disease that results from the environmental conditions of any place outside Canada to which he was assigned and the dependants of a deceased employee whose death is caused by reason of such a disease, are entitled to receive compensation at the same rate as they would be entitled to receive under the *Government Employees Compensation Act* if the disease were an industrial disease, and the right to and the amount of such compensation shall be determined by the same board, officers or authorities and in the same manner as if the disease were an industrial disease.

(2) For the purposes of determining whether an employee or his dependants are entitled to receive compensation under this section, a certificate of a medical doctor employed by the Department of National Health and Welfare certifying that the disease

(a) is clearly attributable to environmental conditions of the place outside Canada to which the employee was assigned, and

(b) is of a type that would not normally be contracted in Canada,

shall be accepted as *prima facie* proof that the disease results from the environmental conditions of the place outside Canada to which the employee was assigned.

Control Measures

4. Where, in his opinion, employees are exposed to the hazard of an industrial disease or a disease described in section 2, the Deputy Minister of National Health or a person authorized by him for that purpose may recommend such preventative and control measures as he deems necessary and may advise such officers of the employing department or agency of the Government of Canada as he deems appropriate that such measures should be instituted and maintained.

May Provide Medical Services

5. The Minister may, by arrangement with appropriate officers of the Department of National Health and Welfare, the Department of Veterans Affairs or any other department or agency of the Government of Canada, provide for the use of the services of medical and other health officers or other services of any such department or agency that may be required in dealing with or disposing of claims for compensation under the *Government Employees Compensation Act* or these Regulations including, without restricting the generality of the foregoing, medical examinations of persons claiming compensation.

Determine Place of Employment

6. For the purposes of the *Government Employees Compensation Act*, the place where an employee is usually employed is the place where the employee has been appointed or engaged to work

(a) in the case of an employee appointed under the *Public Service Employment Act,* by the Public Service Commission, and

(b) in the case of an employee appointed or engaged otherwise than under the *Public Service Employment Act*, by the Governor in Council or the department, company, corporation, commission, board or agency who appointed or engaged the employee,

and where, in the opinion of the Minister, it is doubtful where an employee is appointed or engaged to work, the Minister may determine the place where an employee is usually employed.

[NOTE: Official French version has been omitted]

SCHEDULE C

Manitoba Regulation 24/77

BEING A REGULATION UNDER THE WORKERS COMPENSATION ACT RESPECTING FIRE FIGHTERS

(Filed January 27, 1977)

1 In the regulation "fire fighter" means a full time member of a professional fire fighting department.

2 Where

(a) a fire fighter suffers injury to the heart diagnosed as such by a duly qualified medical practitioner;

(b) the fire fighter has been in continuous service as a fire fighter during the 2 years immediately preceding the injury; and

(c) the fire fighter on or after beginning service as a fire fighter underwent a physical examination, including an examination of the circulatory system, required by the fire fighting department of which he is a member, and was in light of the physical examination approved for service as a fire fighter;

unless the contrary is shown, the injury shall be presumed to have arisen out of and in the course of his employment as a fire fighter.

3 A fire fighter who has had an injury to the heart and who has, thereafter, been medically certified to be fit for service as a fire fighter is, in the case of any subsequent injury to the heart, entitled to the benefit of section 2.

4 Where a fire fighter suffers injury to his lungs, brain or kidneys, unless the contrary is shown, the injury shall be presumed to have arisen out of and in the course of his employment as a fire fighter resulting from the inhalation of smoke, gases and fumes or any of them.

5 Where a fire fighter suffers disability by reason of inhalation of carbon monoxide, unless the contrary is shown, the disability shall be presumed to have been caused by injury arising out of and in the course of his employment as a fire fighter.

6 Where a fire fighter is disabled by reason of injury to his lungs, brain or kidneys resulting from the inhalation of smoke, gases and fumes or any of them, or by reason of inhalation of carbon monoxide, the date of the beginning of the disability shall be deemed to be the date of the accident causing the disability.

7 Manitoba Revised Regulation W200-R2 is repealed.

SCHEDULE D

[Schedule of Industrial Diseases: Prince Edward Island]

SCHEDULE*

DESCRIPTION OF DISEASES	DESCRIPTION OF PROCESS
Anthrax	Handling of wool, hair bristles, hides and skins
Lead Poisoning or its Sequelae	Any process involving the use of lead or its preparations or compounds
Mercury Poisoning or its Sequelae	Any process involving the use of mercury or its preparations or compounds
Phosphorus or its Sequelae	Any process involving the use of phosphorous or its preparations or compounds
Sulphur Poisoning or its Sequelae	Any process involving the use of sulphur or its preparations or compounds
Ammonia Poisoning or its Sequelae	Any process involving the use of ammonia or its preparations or compounds
Carbon Bisulphide or its Sequelae	Any process involving the use of carbon bisulphide
Frost-bite	Any outdoor work
Dermatitis veneneta	Any industrial process involving the handling or use of irritants capable of causing or producing dermatitis venenata
Epitheliomatous cancer or ulceration of the skin due to tar, pitch, bitumen, mineral oil or paraffin, or any compound, product or residue of any of these substances	Handling or use of tar, pitch, bitumen, mineral oil or paraffin, or any compound, product or residue of any of these substances
Conjunctivitis and retinitis	Due to electro and oxy-welding and cutting
Silicosis	Any process involving the inhalation of silica dust
Arsenic Poisoning or its Sequelae	Any process involving the use of arsenic or its preparations or compounds
Bursitis	Any process involving continuous rubbing, pressure or vibration of the parts affected
Retinitis	Electro-welding or acetylene welding
Infected Blisters	Any process involving continuous friction, rubbing or vibration causing blisters or abrasions
Undulant Fever (Brucellosis)	Any process involving exposure to infected materials as in meat packing plants
Industrial Deafness	Any industry involving prolonged and continued exposure to excessive noise

R.S.P.E.I. 1951, c. 178; 1970, c. 56, s. 3.

*[Note: the Schedule is referred to in clause 1(i) of the Act]

SCHEDULE E

[Newfoundland Regulation 330/83]

...

Industrial Diseases

28. Pursuant to subsection (2) of section 78 of the Act the following sets out industrial diseases and associates descriptions of processes with the diseases:

Industrial Disease	Description of Process*
1. Pneumoconiosis caused by sclerogenic mineral dust (silicosis, anthraco-silicosis, asbestosis) and siliciotuberculosis, provided that siliciosis is an essential factor in causing the resultant incapacity or death.	All work involving exposure to the risk concerned.
2. Bronchopulmonary diseases caused by hard-metal dust.	All work involving exposure to the risk concerned.
3. Bronchopulmonary diseases caused by cotton dust (byssinosis), or flax, hemp or sisal dust.	All work involving exposure to the risk concerned.
4. Occupational asthma caused by sensitising agents or irritants both recognized in this regard and inherent in the work process.	All work involving exposure to the risk concerned.
5. Extrinsic allergic alveolitis and its sequelae caused by the inhalation of organic dusts, as prescribed by national legislation.	All work involving exposure to the risk concerned.
6. Diseases caused by beryllium or its toxic compounds.	All work involving exposure to the risk concerned.
7. Diseases caused by cadmium or its toxic compounds.	All work involving exposure to the risk concerned.
8. Diseases caused by phosphorous or its toxic compounds.	All work involving exposure to the risk concerned.
9. Diseases caused by chromium or its toxic compounds.	All work involving exposure to the risk concerned.
10. Diseases caused by manganese or its toxic compounds.	All work involving exposure to the risk concerned.
11. Diseases caused by arsenic or its toxic compounds.	All work involving exposure to the risk concerned.
12. Diseases caused by mercury or its toxic compounds.	All work involving exposure to the risk concerned.
13. Diseases caused by lead or its toxic compounds.	All work involving exposure to the risk concerned.
14. Diseases caused by fluorine or its toxic compounds.	All work involving exposure to the risk concerned.
15. Diseases caused by carbon disulfide.	All work involving exposure to the risk concerned.
16. Diseases caused by the toxic halogen derivatives of aliphatic or aromatic hydrocarbons.	All work involving exposure to the risk concerned.
17. Diseases caused by benzene or its toxic homologues.	All work involving exposure to the risk concerned.
18. Diseases caused by toxic nitro and amio-derivatives of benzene or its homologues.	All work involving exposure to the risk concerned.
19. Diseases caused by nitroglycerin or other nitric acid esters.	All work involving exposure to the risk concerned.
20. Diseases caused by alcohols, glycols or keytones.	All work involving exposure to the risk concerned.
21. Diseases caused by asphyxiants: carbon monoxide, hydrogen cyanide or its toxic derivatives, hydrogen sulfide.	All work involving exposure to the risk concerned.
22. Hearing impairment caused by noise.	All work involving exposure to the risk concerned.
23. Diseases caused by vibration (disorders of muscles, tendons, bones, joints, peripheral blood vessels or peripheral nerves).	All work involving exposure to the risk concerned.
24. Diseases caused by work in compressed air.	All work involving exposure to the risk concerned.
25. Diseases caused by ionising radiations.	All work involving exposure to the risk concerned.
26. Skin diseases caused by physical, chemical or biological agents not included under other items.	All work involving exposure to the risk concerned.

27. Primary epitheliomatous cancer of the skin caused by tar, pitch, bitumen, mineral oil, anthracene, or the compounds, products or residues of these substances.	All work involving exposure to the risk concerned.
28. Lung cancer or mesotheliomas caused by asbestos.	All work involving exposure to the risk concerned.
29. Infectious or parasitic diseases contracted in an occupation where there is a particular risk of contamination.	(a) Health or laboratory work. (b) veterinary work. (c) work handling animals, animal carcases, parts of such carcases, or merchandise which may have been contaminated by animals, animal carcases,or parts of such carcases. (d) Other work carrying a particular risk of contamination.

*In the application of this Table the degree and type of exposure should be taken into account when appropriate.

SCHEDULE F

[excerpted from Newfoundland's *The Workers Compensation Act, 1983]*

79.(1) Subject to subsections (2) and (3) but notwithstanding any other provision of this Act or the regulations, other than those regulations referred to in subsection (2), where

(a) a worker suffers from a chronic obstructive pulmonary disease or from silicosis or carcinoma and is thereby disabled from earning full wages at the work at which he was employed, or his death is or was, as the case may be, caused by such disease and such worker was employed at any time, whether before or after the first day of January, 1951, in fluorspar extraction, or both, at St. Lawrence; or

(b) a worker or a deceased worker is listed in the Appendix to chapter XVIII of the Report of the Royal Commission Respecting Radiation, Compensation and Safety at the Fluorspar Mines, St. Lawrence, Newfoundland, 1969, as being entitled to compensation under the Commission's recommendations, whether by majority decision or decision of a single member,

the disease or disability suffered by such worker or his death, as the case may be, shall be deemed to be due to the nature of the employment in the said mines unless it is traceable to other employment and the worker or, if the worker is dead or dies, his dependents are entitled to compensation

(c) from the date referred to in subsection (4); or

(d) from the date of disability or death, as the case may be,

whichever is later, as if the disease were an injury arising out of and in the course of his employment in the said mines and the disablement or death, as the case may be, were the happening of the injury.

(2) The intent of this section is that the recommendations respecting compensation appearing in the Report referred to in subsection (1) including any minority recommendations, shall, subject always to subsection (3), be fully implemented, and this section shall be interpreted in the light of this intent, and, to dispel all doubt, the Lieutenant-Governor in Council may make regulations for the purpose of effecting the said intent.

(3) Nothing in this section shall entitile

(a) any worker or the dependent of a deceased worker or any other person to claim compensation for any period before the date mentioned in subsection (4); or

(b) the personal representative, widow or widower or next of kin of any deceased dependent of a worker, if such widow or next of kin is not a dependent of such worker to claim any compensation whatsoever for any period before or after the date mentioned in subsection (4).

(4) This section is deemed to have come into force on the first day of September, 1969.

SCHEDULE G

[Nova Scotia Schedule of Industrial Diseases]

INDUSTRIAL DISEASES

Description of Diseases	Description of Process
Anthrax	Handling of wool, hair, bristles, hides and skins
Carbon Monoxide Poisoning	Any process of work involving exposure to carbon monoxide
Lead poisoning or its sequelae	Any process involving the use of lead or its preparations or compounds
Mercury poisoning or its sequelae	Any process involving the use of mercury or its preparations or compounds
Phosphorus poisoning or its sequelae	Any process involving the use of phosphorus or its preparations or compounds
Arsenic poisoning or its sequelae	Any process involving the use of arsenic or its preparations or compounds
Ankylostomiasis	Mining
Subcutaneous cellulitis of the hand (Beat hand)	Mining
Subcutaneous cellulitis over the Patela (Miner's beat knee)	Mining
Acute bursitis over the elbow (Miner's beat elbow)	Mining
Frost-bite	Any outdoor work
Dermatitis venenata	Any industrial process involving the handling or use of irritants capable of causing or producing dermatitis venenata
Epitheliomatous cancer or ulceration of the skin due to tar, pitch, bitumen, mineral oil or paraffin or any compound, product or residue of any of these substances	Handling or use of tar, pitch, bitumen, mineral oil or paraffin, or any compound, product or residue of any of these substances
Coal miner's pneumonoconiosis	Coal Mining
Tenosynovitis (simple)	Any process involving constantly repeated vibration or excessive use of muscles of arm, forearm, hand, leg, ankle or foot
Any disease or disability due to exposure to x-rays [X rays], radium, or other radioactive substances	Any process in the refining of radium or other radioactive substances or involving exposure to x rays [X rays]

1968, c. 65, s. 4.

SCHEDULE H

[excerpted from New Brunswick Regulation 84-66]

...

1 This Regulation may be cited as the *General Regulation—Workers' Compensation Act.*

...

INDUSTRIAL DISEASES

13. The following diseases are hereby declared to be industrial diseases:

(a) anthrax transmitted by the handling of wool, hair, bristles, hides and skins;

(b) lead poisoning or its sequelae caused by any process involving the use of lead or its preparation or compounds;

(c) mercury poisoning or its sequelae caused by any process involving the use of mercury or its preparations or compounds;

(d) phosphorus poisoning or its sequelae caused by any process involving the use of phosphorusor its preparations or compounds;

(e) arsenic poisoning or its sequelae caused by any process involving the use of arsenic or its preparations or compounds;

(f) sulphur poisoning or its sequelae caused by any process involving the use of sulphur or its preparations or compounds;

(g) ammonia poisoning or its sequelae caused by any process involving the use of ammonia or its preparations or compounds;

(h) carbon bisulphide poisoning or its sequelae caused by any process involving the use of carbon bisulphide;

(i) carbonic acid gas poisoning caused by any process involving the use of carbonic acid gas;

(j) glanders contracted during the care of any equine animal suffering from glanders or during the handling of the carcass of any such animal;

(k) compressed air illness caused by any process carried on in compressed air;

(l) infection caused by the handling of sugar during any process involving the refining of sugar;

(m) carbon monoxide poisoning;

(n) conjunctivitis and retinitis due to electro and oxy-welding and cutting;

(o) bursitis of the prepatellar or of the olecranon bursa due to the nature of employment;

(p) silicosis;

(q) poisoning caused by chemicals used in the painting industry;

(r) brass, nickel and zinc poisoning;

(s) pneumoconiosis;

(t) brucellosis (undulant fever);

(u) hearing loss caused by industrial trauma or noise induced due to excessive levels of noise in the work-place; and

(v) dermatitis caused by materials used due to the nature of the employment.

...

SCHEDULE I

[Schedule B of Alberta Regulation 427/81]

COLUMN 1	COLUMN 2
Description of Disease or Condition	Industry or Process
1 Poisoning by	1 An Industry or Process
(a) Lead;	(a) where there is significant occupational exposure to lead or lead compounds;
(b) Mercury;	(b) where there is significant occupational exposure to mercury or mercury compounds;
(c) Arsenic or arsine;	(c) where there is significant occupational exposure to arsenic or arsenic compounds;
(d) Cadmium;	(d) where there is significant occupational exposure to cadmium or cadmium compounds;
(e) Manganese;	(e) where there is significant occupational exposure to manganese or manganese compounds;
(f) Phosphorus, phosphine or the anti-cholinesterase action of organic phosporus compounds;	(f) where there is significant occupational exposure to phosphorus or phosphorus compounds;
(g) Organic solvents (n-hexane, carbon tetra-chloride, trichloroethane, trichloroethylene, acetone, benzene, toluene, xylene and others);	(g) where there is significant occupational exposure to organic solvents;
(h) Carbon monoxide;	(h) where there is significant occupational exposure to products of combustion, or any other source of carbon monoxide;
(i) Hydrogen sulphide;	(i) where there is excessive occupational exposure to hydrogen sulphide;
(j) Nitrous fumes (including silofiller's disease);	(j) where there is excessive occupational exposure to nitrous fumes including the oxides of nitrogen;
(k) Nitriles, hydrogen cyanide or its soluble salts;	(k) where there is occupational exposure to chemicals containing – CN group including dangerous pesticides;
(l) Phosgene;	(l) where there is excessive occupational exposure to phosgene including its occurrence as a breakdown product of chlorinated compounds by combustion;
(m) Other toxic substances.	(m) where there is significant occupational exposure to toxic gases, vapours, mists, fumes or dusts.
2 Infection caused by	2 An Industry or Process
(a) Staphylococcus aureus, Salmonella organisms, Hepatitis B virus;	(a) where close and frequent occupational contact with a source or sources of the infection has been established and the employment necessitates (i) the treatment, nursing or examination of, or interviews with, patients or ill persons; (ii) the analysis or testing of body tissues of fluids, or (iii) research into salmonella, pathogenic staphylococci or Hepatitis B virus;
(b) Brucella organisms (Undulant fever);	(b) where there is occupational contact with animals, carcasses or animal by-products;
(c) Tubercle bacillus;	(c) where close and frequent occupational contact with a source or sources of tuberculous infection has been established and the employment necessitates (i) the treatment, nursing or examination of patients or ill persons, (ii) the analysis or testing of body tissues or fluids, or (iii) research into tuberculosis by a worker who:

	(A) when first engaged, or, after an absence from employment of the types mentioned in these regulations for a period of more than one year, when re-engaged in such employment, was free from evidence of tuberculosis, and (B) continued to be free from evidence of tuberculosis for 6 months after being so employed (except in primary tuberculosis as proven by a negative tuberculin test at time of employment).
3 Pneumoconiosis	3 Industry or process
(a) Silicosis;	(a) where there is occupational exposure to airborne silica dust including metalliferous mining and coal mining;
(b) Asbestosis;	(b) where there is occupational exposure to airborne asbestos dust;
(c) Other pneumoconioses.	(c) where there is significant occupational exposure to the air-borne dusts of coal, beryllium, tungsten carbide, aluminum or other dusts known to produce fibrosis of the lungs.
4 Asthma	4 An industry or process where asthma is precipitated or aggravated by occupational exposure to any or all of the following irritants: (a) western red cedar dust; (b) isocyanate vapours or gases; (c) the dust, fume or vapours of other chemicals or organic material known to cause asthma.
5 Extrinsic allergic alveolitis (including farmers' lung and mushroom workers' lung).	5 An industry or process where there is significant occupational exposure to respirable organic dusts.
6 Noise deafness or hearing loss related to occupational noise or acoustic trauma.	6 An industry or process where there is prolonged occupational exposure to excessive noise levels.
7 Contact dermatitis.	7 An industry or process where there is occupational exposure to irritants, allergens or sensitizers that ordinarily cause dermatitis.
8 Vascular disturbances of the extremities.	8 Employment for at least 2 continuous years immediately preceding the vasospastic response in an industry involving the use of high frequency, rapid acceleration vibratory tools.
9 Radiation injury or disease	9 An industry or process
(a) due to ionizing radiation;	(a) where there is significant occupational exposure to ionizing radiation;
(b) due to non-ionizing radiation	
(i) conjunctivitis, keratitis	(b)(i) where there is significant occupational exposure to ultraviolet light
(ii) cataract or other thermal damage to the eye.	(b)(ii) where there is significant occupational exposure to infra-red, microwave or laser radiation.
10 Erosion of incisor teeth.	10 An industry or process where there is significant occupational exposure to acid fumes or mist.

SCHEDULE J

[Schedule D to Quebec's *Act*]

Occupational Diseases

Description of Diseases	Description of Process
(1) Infected blisters:	Any process involving continuous friction, rubbing or vibration.
(2) Anthrax:	Handling of wool, hair, bristles, hides and skins.
(3) Brucellosis:	Care, slaughtering, cutting, transport of slaughterhouse animals. Laboratory work of an employer subject to the act.
(4) Bursitis:	Any process involving continuous rubbing, pressure, irritation or vibration of the parts affected.
(5) Dermatitis:	
(6) Poisoning or its sequelae:	
(a) Arsenic:	Any process involving the use of arsenic or its preparations or compounds.
(b) Benzol:	Any process involving the use of benzol.
(c) Cadmium:	Any process involving the use of cadmium or its preparations or compounds.
(d) Chrome:	Any process involving the use of chromium or its compounds.
(e) Brass, nickel, zinc:	Any process involving the use of nickel or brass, or melting or smelting of zinc.
(f) Chlorinated hydrocarbons, Carbon tetrachloride, Trichlorethylene, Tetrachlorethane, Trichloronaphtalene and others:	Any process in the manufacture or involving the use of these substances.
(g) Mercury:	Any process involving the use of mercury or its perparations [sic] or compounds.
(h) Nitro-and amino-derivatives of benzene, phenol and their homologues (trinitrotoluene, dinitrophenol, anilin and others):	Handling any nitro- or amino-derivatives of benzene or phenol or any of their homologues, or any process in the manufacture or involving the use thereof.
(i) Carbon Monoxide:	Any process involving the emanation of carbon monoxide.
(j) Phosphorus:	Any process involving the use of phosphorus or its preparations or compounds.
(k) Lead:	Any process involving the use of lead or its preparations or compounds.
(l) Nitrous fumes:	Any process in which nitrous fumes are evolved.
(7) Compressed air illness or caisson disease:	Any work carried on in compressed air.
(8) Diseases caused by exposure to X-Ray or radium or other radioactive substances:	
(9) Pneumoconiosis (Silicosis and asbestosis):	Mining, quarrying, cutting, crushing, grinding or polishing of stone. Smelting, grinding or polishing of metal. Pottery.
(10) Retinitis:	Electro-welding or acetylene welding.
(11) Tenosynovitis:	
(12) Deafness:	Any process involving exposure to levels of excessive noise. (S.Q. 1978, c. 57, s. 72.)

[excerpted from Quebec's *Occupational Diseases Regulation,* O.C. 2870-81]

1. In addition to the occupational diseases in Schedule D to the Workmen's Compensation Act (R.S.Q., c. A-3) the occupational diseases listed in Schedule 1 to this Regulation are also recognized as characteristic of a particular type of work or directly related to the risks inherent in a particular type of work.

...

SCHEDULE 1

Disease	Type of work
1. Poisoning:	
(1) Diseases caused by monochloroethylene (vinyl chloride) and its toxic compounds	Any work involving exposure to this substance

	Disease	Type of work
(2)	Diseases caused by manganese and its toxic compounds	Any work involving the utilization or handling or other form of exposure to manganese, its compounds or other substances containing manganese
(3)	Diseases caused by beryllium and its toxic compounds	Any work involving the utilization or handling or other form of exposure to beryllium, its compounds or other substances containing beryllium
(4)	Diseases caused by chlorine and its toxic compounds	Any work involving the utilization or handling or other form of exposure to chlorine, its compounds or other substances containing chlorine
(5)	Diseases caused by sulfur and its toxic compounds	Any work involving the utilization or handling or other form of exposure to sulfur, its compounds or other substances containing sulfur
(6)	Diseases caused by fluorine and its toxic compounds	Any work involving the utilization or handling or other form of exposure to fluorine
(7)	Diseases caused by pesticides (organic chlorates, organic phosphates, carbamates, methyl bromide, ethylene oxyde, acrylonitrile, copper salts and others)	Any work involving exposure to such pesticides
(8)	Diseases caused by nitroglycerin or other nitric acid esters	Any work involving exposure to such substances
(9)	Diseases caused by hydrogen cyanide or its toxic derivatives	Any work involving exposure to such substances
2.	**Infectious diseases:**	
(1)	Viral hepatitis	Any work involving contact with people, human products or other contaminated substances
(2)	Dermatophytosis of animal origin	Any work involving contact with animals or places where animals live
(3)	Tuberculosis	Any work involving contact with contaminated humans or animals, human or animal products or other contaminated substances
(4)	Multiple warts on the hand	Any work involving the slaughtering of animals or the handling of animals or animal products under humid conditions (maceration)
3.	**Dermatoses:**	
(1)	Dermatoses caused by cement	Any work involving contact with cement or exposure to cement dust
(2)	Dermatoses caused by solvents	Any work involving the utilization or handling of solvents
(3)	Dermatoses caused by detergents	Any work involving the utilization or handling of detergents
(4)	Dermatoses caused by oils or greases	Any work involving the utilization or handling of oil or grease
(5)	(a) Telangiectasia	(a) Work performed in aluminium plants, involving repeated exposure to ambiant air in potrooms
	(b) other cutaneous manifestations of disease caused by tar (pitch)	(b) Any work involving exposure to tar (pitch)
(6)	Dervatoses caused by chromium	Any work involving contact with chromium and its compounds
(7)	Dermatoses caused by mechanical action	Any work involving friction, vibration or maceration
(8)	Dermatoses caused by chemical action	Any work involving contact with acids or bases
4.	**Pneumoconiosis:**	
(1)	Byssinosis	Any work involving exposure to cotton, flax, hemp or sisal dust

(2)	Siderosis	Any work involving exposure to iron oxide
(3)	Talcosis	Any work involving exposure to talc dust
(4)	Bronchopneumopathy caused by dust from hard metals	Any work involving exposure to hard metals

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5. Diseases caused by physical agents:

(1)	Secondary muscular-skeletal lesions resulting from repeated movements or pressures manifested by objective signs	Any work involving repeated movements (gestures) or pressures over an extended period of time
(2)	Diseases caused by vibration (effects on muscles tendons, bones, joints, peripheral vessels or peripheral nerves)	Any work involving vibrations
(3)	Diseases caused by heat	Any work performed at high temperatures

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6. Respiratory irritations and allergies:

(1)	Professional asthma caused by sensitizing agents or irritants recognized as such and inherent in the type of work	Any work involving exposure to irritants to the respiratory tract or exposure to allergenics
(2)	Extrinsic allergic alveolitis caused by the inhalation of organic dust	Any work involving exposure to irritants to the respiratory tract or exposure to allergenics

[NOTE: Section headings and statute enactment notes have been omitted]

Chapter I-7

AN ACT RESPECTING INDEMNITIES FOR VICTIMS OF ASBESTOSIS AND SILICOSIS IN MINES AND QUARRIES

1. In this act, unless the context indicates a different meaning,

(*a*) "Commission" means the Commission de la santé et de la sécurité du travail;

(*b*) "employment" means employment in underground works and surface employment, in drilling, loading, hauling, crushing, grinding, sifting and screening of stone and ore, stone cutting and polishing and ore treatment, and any other employment on a mine or quarry site where a person is exposed to asbestos or silica dust;

(*c*) "worker" means a person, except a student, holding employment contemplated in paragraph *b*, in a mine or quarry, including a member of the executive or support staff;

(*d*) "disposable net income" means the gross annual income of the worker from employment contemplated in paragraph *b*, less the annual deductions provided for by the taxation tables, and the deductions for the Québec Pension Plan, the Québec Health Insurance Plan and unemployment insurance.

2. (1) A worker suffering from permanent disability resulting from silicosis or asbestosis medically established by diagnosis is entitled:

(*a*) to a fixed indemnity established according to Schedule A, in proportion to the degree of permanent disability of the worker; and, if he ceases to be employed by reason of such permanent disability,

(*b*) to a complementary indemnity equivalent to 90% of his disposable net income.

If the permanent disability was established before 27 June 1975, the worker who ceases to be employed by reason of such disability is not entitled to the fixed indemnity.

(2) Every sum paid to the worker under a collective aggrement [sic] or under another act of Québec or Canada by reason of the cessation of the employment of such worker must be deducted from such complementary indemnity.

The beneficiary of a complementary indemnity must, without delay, advise the Commission of any change in his situation rendering inaccurate the information he has furnished and having a bearing on the indemnity to be granted to him.

(3) Every decision concerning the complementary indemnity favourable to the worker is executory notwithstanding the appeal provided for in section 12.

3. The gross annual income of the worker shall not be taken into consideration for an amount greater than the maximum rate of annual earnings established according to subsection 1 of section 46 of the Workmen's Compensation Act (chapter A-3).

4. If the worker contemplated in section 2 obtains new employment, whether or not it is mentioned in paragraph *b* of section 1, the complementary indemnity shall be reduced by an amount equivalent to 50% of the disposable net income from such new employment not exceeding $5,000 or, if such income exceeds $5,000, equivalent to 50% of the first $5,000 and 75% of the remainder.

5. The right to the complementary indemnity may be refused, discontinued or suspended in the case of the worker contemplated in section 2 who, without valid reason:

(*a*) refuses a new employment which is offered to him by the Commission;

(*b*) leaves such an employment although he could continue to hold it;

(*c*) refuses or neglects to avail himself of the training, rehabilitation or treatment measures made available to him;

(*d*) refuses or neglects to avail himself of the benefits he is entitled to by virtue of any agreement or any other act; or

(*e*) refuses or neglects to furnish the information required for the application of this act.

6. The worker contemplated in section 2 shall lose his right to the complementary indemnity on attaining the age of 65 years, except to the extent that, due to his condition, he does not benefit by the retirement pension paid under the Act respecting the Québec Pension Plan to which he would normally have been entitled. In such case, an indemnity corresponding to the loss he incurs must be paid to him.

7. The following shall be deducted from the complementary indemnity:

(*a*) the pensions for permanent disability, whatever the cause, granted to the worker before 27 June 1975; and

(*b*) the pensions for permanent disability not caused by asbestosis or silicosis granted to the worker after 27 June 1975.

The pensions contemplated in this section shall continue to be paid in accordance with the Workmen's Compensation Act (chapter A-3).

8. In case of the aggravation, subsequent to 27 June 1975, of a permanent disability caused by asbestosis or silicosis for which a pension has been granted under the Workmen's Compensation Act, the worker is entitled to a fixed indemnity for such aggravation established according to Schedule A and, where it applies, to a complementary indemnity.

9. The worker who, without being entitled to it, receives all or part of an indemnity is bound to immediately reimburse any overpayment. The Commission must, in such case, recover such overpayment or deduct it from the amount of any indemnity to be paid to the worker. If such worker acted in bad faith, the Commission may add the amount of the interest to the deduction or reimbursement of the overpayment.

10. The indemnities provided for in section 2 shall be indexed in the manner provided by section 41 of the Workmen's Compension [sic] Act.

11. The Commission de la santé et de la sécurité du travail is charged with the carrying out of this act.

In the administration of this act, the Commission shall apply the provisions of the Workmen's Compensation Act not inconsistent with this act.

12. Every decision under subsection 1 of section 2 and every decision under sections 5 and 8 rendered by a review board in accordance with section 64 of the Workmen's Compensation Act is subject to appeal before the Commission des affaires sociales, which shall dispose of it in accordance with its rules of proof, procedure and practice.

The appeal shall be lodged within 90 days of notification of the decision. The Commission des affaires sociales may however allow a person to act after the expiry of such delay if that person shows that it was in fact impossible for him to act sooner.

A review board with which an application for review of a decision pursuant to subsection 1 of section 2 is filed must, when so required, in respect of any decision of a medical nature, render its decision on the report of a committee of three medical experts, one member being appointed by the employer, one member being appointed by the worker and the third being selected by them from a list of medical specialists furnished by the Conseil consultatif du travail et du la main d'oeuvre or, if there is disagreement, by the Commission.

The terms and conditions of appointment of members are determined by regulation.

The cost of such expert's opinion are charged to the Commission.

13. The Government may make regulations:

(*a*) to determine the terms and conditions of the application of section 6;

(*b*) to determine the terms and conditions of appointment of members to a committee formed under section 12.

14. The expenses incurred for the carrying out of this act shall be paid out of the accident fund established by the Workmen's Compensation Act.

15. The Government shall designate a minister to be responsible for the application of this act.

16. This act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

SCHEDULE A

(Section 2)

LUMP INDEMNITY BASED ON 100% PERMANENT DISABILITY

Age		*Age*	
18 or under.	$30,000	56	14,841
19	29,739	57	14,385
20	29,472	58	13,932
21	29,196	59	13,485
22	28,911	60	13,038
23	28,617	61	12,594
24	28,311	62	12,150
25	27,999	63	11,709
26	27,672	64	11,268
27	27,336	65	10,830
28	26,991	66	10,398
29	26,637	67	9,975
30	26,274	68	9,558
31	25,902	69	9,147
32	25,524	70	8,745
33	25,137	71	8,352
34	24,741	72	7,962
35	24,342	73	7,581
36	23,934	74	7,203
37	23,517	75	6,834
38	23,094	76	6,474
39	22,665	77	6,126
40	22,227	78	5,784
41	21,786	79	5,451
42	21,339	80	5,133
43	20,886	81	4,824
44	20,427	82	4,530
45	19,969	83	4,245
46	19,503	84	3,975
47	19,035	85	3,717
48	18,567	86	3,471
49	18,093	87	3,237
50	17,622	88	3,015
51	17,154	89	2,805
52	16,683	90	2,607
53	16,218	91	2,421
54	15,756	92	2,244
55	15,297	93	2,076
		94	1,920
		95	1,776
		96	1,632
		97	1,491
		98	1,344
		99	1,140
		100 or over	912

SCHEDULE L

[Schedule 3 to Ontario Regulation 951]

Column 1 Description of Disease	Column 2 Process
1. Anthrax	Handling of wool, hair, bristles, hides and skins
2. Infected blisters	Any process involving continuous friction
3. Bursitis	
4. Epitheliomatous cancer or ulceration of the skin due to tar, pitch, bitumen, mineral oil or paraffin or any compound, product or residue of any of these substances	Handling or use of tar, pitch, bitumen, mineral oil or paraffin or any compound, product or residue of any of these substances
5. Compressed-air illness or caisson disease	Any process carried on in compressed air
6. Dermatitis venenata	
7. Poisoning and its sequelae by	
(*i*) arsenic	Any process involving the use of arsenic or its preparations or compounds
(*ii*) benzol	Any process involving the use of benzol
(*iii*) beryllium	Any process involving the use of beryllium or its preparations or compounds
(*iv*) brass, nickel or zinc	Any process involving the use of brass or nickel or melting or smelting zinc
(*v*) cadmium	Any process involving the use of cadmium or its preparations or compounds
(*vi*) carbon bisulphide	Any process involving the use of carbon bisulphide or its preparations or compounds
(*vii*) carbon dioxide	Any process involving the evolution of carbon dioxide
(*viii*) carbon monoxide	Any process involving the evolution of carbon monoxide
(*ix*) chlorinated hydrocarbons (carbon tetrachloride, trichlorethylene, tetrachlorethane, trichlornaphthalene and others)	Any process in the manufacture or involving the use of these substances
(*x*) chrome	Any process involving the use of chromium or its compounds
(*xi*) lead	Any process involving the use of lead or its preparations or compounds
(*xii*) mercury	Any process involving the use of mercury or its preparations or compounds
(*xiii*) nitro derivatives and amino derivatives of benzene, phenol and their homologues (trinitrotoluene, dinitrophenol, anilin and others)	Handling any nitro derivatives or amino derivatives or benzene or phenol or any of their homologues or any process in the manufacture or involving the use thereof
(*xiv*) nitrous fumes	Any process in which nitrous fumes are evolved
(*xv*) phosphorus	Any process involving the use of phosphorus or its preparations or compounds
8. The pneumoconioses other than silicosis	
9. Any disease due to exposure to X-rays, radium or other radioactive substances	
10. Respiratory disease due to the inhalation of materials used in non-offset sprays	Any process or occupation involving the use of non-offset sprays in the printing industry
11. Retinitis due to electro-welding or acetylene-welding	
12. Silicosis	Mining or quarrying, cutting, crushing, grinding or polishing stone, or grinding or polishing metal
13. Teno-synovitis	
14. Tuberculosis contracted by a workman employed by and in,	

(*i*) a hospital, jail, sanatorium, convalescent home, nursing home, home for the aged, health unit or visiting nursing association to which Part I of the Act applies; or (*ii*) a laboratory, reform institution, health unit or treatment centre operated by the Province of Ontario	
15. Ulceration of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil or paraffin, or any compound, product or residue of any of these substances	Handling or use of tar, pitch, bitumen, mineral oil or paraffin, or any compound, product or residue of any of these substances

SCHEDULE M

[excerpted from Workmen's [sic] Compensation Board of Ontario, *Board Policies and Administrative Directives,* 1979, pp. 178-194A]

SECTION 118-(1)

Directive 1. (1) The following interpretation of sub-sections (1) and (8) of Section 118 effective on and after the 1st day of December, 1934 is confirmed.

(2) Sub-section (8) raises the presumption in the employee's favour so that, where it is shown that the employee at or immediately before the date of his disablement was employed in one of the processes mentioned in the second column of Schedule 3 and the disease contracted is the disease in the first column of Schedule 3 set opposite to the description of the process, the disease is deemed to have been due to the nature of the employment unless the contrary is proved, and the onus is not on the employee to establish his claim.

(3) The industrial disease need not necessarily have been contracted in the process set opposite to it in Schedule 3 and a claim may be compensable under sub-section (1) of Section 118 when it is shown that the disease is due to the nature of any employment under Part 1 in which the employee is engaged, but the onus is on the employee to establish his claim.

Directive 2. In 1956, the Division of Industrial Hygiene had completed a survey in connection with pulmonary cancer at the plant of the Deloro Smelting and Refining Company. This covered a period from 1928 to 1952. As a result of the report the Board developed the following criteria in respect to exposure in this plant: Respiratory cancer due to exposure to arsenic is to be considered a disease peculiar to or characteristic of such exposure employment and compensable where all the following criteria are met:

(a) where there is proof of exposure to arsenic in significant amounts for a minimum of ten years.

(b) only those claims are to be considered compensable where disability has become evident after March 31st, 1947.

(c) disability must be evident within ten years after leaving exposure employment.

It is recommended the following three criteria be a prerequisite to the submission of a possible case of respiratory cancer due to exposure to arsenic or cobalt dust for an expert decision by the Director of Environmental Health Services Branch, Ministry of Health.

(1) Where there is proof of exposure to arsenic in significant amounts to a minimum of four years in the primary treatment plant, or for a minimum of four years to cobalt dust in the cobalt oxide area.

(2) Where there has been a combined exposure in significant amounts to either arsenic or cobalt in two departments amounting to a minimum of five years.

(3) Only those claims are to be considered compensable where disability has become evident since March, 1947.

When a case meets the criteria referred to above, it is to be forwarded to the Director of Enviornmental Health Services Branch, Ministry of Health. His report to the Board shall be expressed by way of an opinion as to whether or not the bronchogenic carcinoma from which the employee is suffering is or is not the result of the exposure defined in the criteria.

The employee's claim is then to be adjudicated on the basis of the opinion Director [sic] of Environmental Health Services Branch, Ministry of Health.

3408-#5

Directive 3.

Carcinoma

(1) Nasal sinus carcinoma and lung carcinoma occurring among certain employees of the International Nickel Company of Canada Limited, Port Colborne, are to be considered under clause (i) sub-section (1) of Section 1 disease peculiar to or characteristic of such exposure employment and compensable providing the approved criteria is met.

(2) As clause (i) sub-section (1) of Section 1 became effective on the 31st day of March, 1947, no disablement which occurred prior to that date is to be considered.

February 22/61; February 23/61
November 30/61

(a) Employment around the cupola furnaces, the calciners, and the sintering machines (but not the onode furnaces) is to be considered exposure employment.

(b) One year of exposure employment is to be established to consider nasal sinua carcinoma.

(c) Three years of exposure employment is to be established to consider lung carcinoma (primary), except around the calciners where the exposure employment is to be five years.

November 30/61
2870-71-#4

(d) Where the nasal carcinoma is involved, there is to be no minimal time lag between the last exposure and date of disablement.

(e) In lung carcinoma, there is to be a minimal five year time leg [sic] between first exposure and date of disablement.

(f) In considering both nasal carcinoma and lung carcinoma there is to be no maximum time lag between first exposure and date of disablement.

(g) Borderline and doubtful claims and claims which are reasonable in all other respects where there is exposure employment in the leaching operation whether this exposure is alone or in combination with other types of exposure within the plant are to be referred to the Board for consideration.

Directive 4. Carcinoma of the lung and and sinus cancer are to be considered as industrial diseases under Section 1(1)(i) of the Workmen's Compensation Act as being peculiar to, and characteristis [sic] of, the particular industrial process, trade, or occupation. Where exposure has been proved in the sinter plant at the Copper Cliff smelter, the following criteria shall apply:

(a) 1 year exposure employment, is to be established to consider lung cancer (primary).

(b) 1 year exposure employment is to be established to consider nasal and sinus cancer.

(c) In all cases arising out of exposure prior to 1952, 6 months exposure employment be established to consider lung and sinus cancer.

(d) In borderline or doubtful claims where exposure may be less than the prescribed 6 months the claim may be referred to the Director of Environmental Health Services, Ministry of Health for his opinion.

November 7/72
4077 #3 Bd.M.

Directive 5.

Asbestos Workers

(1) That lung cancer in asbestos workers be accepted as an industrial disease under Section 118 and Section 1(1)(L) of the Act as peculiar to and characteristic of a process, trade or occupation involving exposure to asbestos.

(2) That based on medical studies, lung cancer claims be favourably considered when the following circumstances apply:

(a) There is a clear and adequate history of at least 10 years occupational exposure to asbestos.

and –

(b) There is a minimum interval of 10 years between first exposure to asbestos and the appearance of lung cancer.

(c) Claims which do not meet the guidelines in (a) and (b) should be individually judged on their own merit having regard to the intensity of exposure and other factors peculiar to the individual case. The benefit of reasonable doubt applies.

April 13/76
4533 – #7

Directive 6.

Mesothelioma

(1) That mesothelioma in asbestos workers be accepted as an industrial disease under Section 118 and 1(1)(L) of the Act as peculiar to and characteristic of a process, trade or occupation involving exposure to asbestos.

That based on medical studies, mesothelioma claims be favourably considered when the following circumstances apply:

(a) There is a clear and adequate history of at least 10 years occupational exposure to asbestos.

and –

(b) There is a minimum interval of 15 years between first exposure to asbestos and the appearance of mesothelioma.

(c) Claims which do not meet the guidelines in (a) and (b) should be individually judged on their own merit having regard to the intensity of exposure and other factors peculiar to the individual case. Consideration will be given where it seems evident that the mesothelioma cancer resulted from occupational exposure to asbestos. The benefit of reasonable doubt applies.

April 13/76
4533 – #7

Directive 7.

Coke Oven Workers

(1) Lung cancer in coke oven workers shall be accepted as an industrial disease under Section 118 and Section 1(1)(L) of the Act as peculiar to and characteristic of exposure to coke oven emissions in the steel industry.

(2) Based on medical studies, lung cancer claims shall be favourably considered when the following appropriate combinations of circumstances regarding exposure, latency, and cessation factors apply:

2.1 Persons employed five or more years in full time topside exposure.

2.2 Persons employed for ten or more years in mixed side-oven/topside exposure

2.3 Persons employed for fifteen or more years in side-oven exposure only.

2.4 The inception (latent) period between first exposure and the acceptance of lung cancer be at least ten years.

2.5 The cessation interval (CI) (time between cessation of occupational risk and appearance of lung cancer) in a smoker shall be fifteen years or less.

2.6 The cessation interval (CI) in a confirmed non-smoker or ex-smoker shall be twenty years or less (see definition below).

(3) Claims which do not meet with criteria in (2) above should be individually judged on their own merits, taking into consideration the variations in intensity and duration of exposure which could cause lung cancer. Where it seems reasonable that lung cancer resulted from exposure to coke oven omissions [sic] in the steel industry, consideration be given to these cases. The benefit of reasonable doubt applies.

Definition of Smoking

1. Non-Smoker – A never smoker. A person who has never smoked even occasionally.
2. Ex-Smoker – A person who has smoked during his lifetime but who has not smoked for the past ten or more years.
3. Smoker – A person who currently smokes, or who has ceased smoking for less than the previous ten years.

Nov. 17, 1978
4762 #9

Directive 8.

Uranium Miners

It is recommended that lung cancer claims for underground miners in the uranium industry be considered where any of the following circumstances apply:

(1) The employee worked at least 5 years underground prior to 1968 and the cancer is of the oat-cell type.

(2) The miner worked more than 10 years underground prior to 1968 and the cancer is primary in the lung.

(3) The accumulated radiation exposure is 120 working level months or more.

(4) Claims which do not meet the above guidelines shall be individually judged on their own merits and consideration given where it seems reasonably evident that the cancer resulted from uranium mining exposure. Consideration will be given to the variances in the record of radiation exposure prior to 1968.

(5) Border line cases are to be considered on their own merits having regard for the accumulative radiation exposure and the benefit of reasonable doubt applies.

(6) The employee's underground work commenced after 1968 the case will be dealt with individually and consideration given where the radiation exposure records make it reasonably evidence [sic] that the cancer resulted from uranium mining exposure.

April 13/76
4533 – #7

Directive 9.

Guidelines for the Adjudication of Claims for Cancer of the Gastro-Intestinal Tract in Asbestos Workers

Gastrointestinal cancer in asbestos workers is to be accepted as an industrial disease under Section 118 and 1(1)(L) of the Act as peculiar to and characteristic of a process, trade or occupation involving exposure to asbestos.

Based on medical studies, gastrointestinal cancer (exophagus, stomach, small bowel, colon and rectum) is to be favourably considered when the following circumstances apply:

1. there is a clear and adequate history of occupational exposure to asbestos dust, and while such occupational exposure cannot be quantitatively described, it should be of a continuous and repetitive nature and should represent or be a manifestation of the major component of the occupational activity.
2. there is a minimal interval of 20 years between first exposure to asbestos and the diagnosis of the gastrointestinal cancer.
3. that all primary cancers associated with the esophagus, stomach, small bowel, colon and rectum be included in the classification of gastrointestinal cancers.
4. that no distinction be given as to the site of the cancer in assessing the merit of a claim.
5. claims which do not meet the guidelines in 1., 2., 3., and 4, should be individually judged on their own merit having regard to the nature of the occupation, the extent of the exposure and other factors peculiar to the individual case. Consideration will be given where it seems evident that the gastrointestinal cancer resulted from occupational exposure to asbestos. The benefit of reasonable doubt applies.

October 7/76
4573 – #1 Bd.M.

Directive 10. Every claim for resistant staphylococcus infection (staphylococcus aureus hemolyticus pyogenes resistant) is to be most carefully scrutinized and for a favourable consideration the following must be apparent in the claim:

(a) Reasonable exposure to the offending organism, such as an injured employee developing infection while he is hospitalized for an injury or an employee of a hospital where infection is present.

(b) The infection is to be the result of proven staphylococcus aureus pyogenes resistant organism and is to be proven by bacteriological culture taken from the abscess, boil, sputum or exudate taken from the lesion at the time of active infection.

(c) The establishment of the diagnosis of a staphylococcus aureus hemolyticus pyogenes resistant infection is to be made from bacteriological culture and at the same time a sensitivity spectrum is to be set up for the purpose of claim record.

(d) Allowance is to be accepted only after the individual claim has been reviewed by two Medical Officers who are in agreement on the acceptability of the claim and the infection.

(e) Where the two adjudication Medical Officers disagree, the claim is to be referred to the Director, Medical Branch in order that uniformity of opinion be reached and the claim be accepted or rejected after collective discussions of the Medical Officers.

September 22/60

Directive 11. (1) Every claim for allergic respiratory illness is to be referred for adjudication to the Industrial Disease Medical Officer in consultation with the Head of the Chest Services Branch.

(a) Investigation as to exposure, examination at the Board's Toronto Office, or referral to a consultant may be ordered.

(2) In prolonged claims where an employee does not show improvement within three months after the removal from exposure to the offending allergen and is still disabled from work, the claim is to be referred to the Industrial Diseases Medical Officer in consultation with the Head of the Chest Services Branch for assessment of continuing entitlement and to determine if any portion of the employee's continuing disability is attributable to a condition or conditions not included in his entitlement under the Act.

(3) Where it is established that maximum recovery has been achieved, the claim is to be brought to settlement.

(a) A permanent award is to be considered where the compensable episode is stabilized and at least six months has elapsed after removal from exposure or from the date of the last exacerbation.

(b) To facilitate consistent evaluation, every clinical permanent disability rating is to be recommended by the Consultant (Permanent Disability) in consultation with the Head of the Chest Services Branch.

May 14/65

(4) At the time of rating, the nature and extent of continuing medical aid is to be defined by the Head of the Chest Services Branch and the principle of the settlement explained to the employee.

May 9/63

Directive 12. (1) Claims for poliomyelitis may be allowed where the diseased employee establishes some contact with the disease.

(2) It must be part of the diseased employee's regular duties arising out of his employer's business to expose himself to the disease, thereby limiting the claims to employees of hospitals coming under Part 1 plus a small group of employees of the Department of Health such as visiting nurses and laboratory technicians and other visiting nurses not necessarily employed by the Department of Health providing the approved criteria is met.

February 27/58

(3) As the disease is not set out in Schedule 3. the onus is on the diseased employee to establish contact with the disease by showing:

(a) that he has not had known contacts with the disease outside his employment under Part 1 and he is to submit a signed statement showing that no close associates such as members of his family and friends have suffered from the disease within a period of four weeks prior to the onset of his symptoms.

(b) that he has had contacts during employment on general ward duties in a non-poliomyelitis ward.

(i) The problem here is that patients on the ward may have the disease which has not been recognized.

(ii) The diseased employee must be actively employed on the ward and not just a casual visitor.

(iii) The diseased employee must supply the name of the patient diagnosed as having the disease.

(iv) The diseased employee must have contacts with this patient during the first twenty-one days of the patient's disease and he must develop the disease within not less than seven days and not more than twenty-one days of contact.

(c) that he has had contacts during employment on ward duty in a poliomyelitis ward.

(i) It is recognized that with the proper techniques none of the attending staff need develop the disease from contact on the ward.

(ii) Any claim is allowable even though there is a break in the technique.

(iii) The diseased employee must supply the name of the patient with the disease.

(iv) The diseased employee must have contacts with this patient during the first twenty-one days of the patient's disease and he must develop the disease within not less than seven days and not more than forty-two days of contact.

(d) that he was required to visit patients during the infectious stage of the disease in the capacity of public health nurse.

(i) he must provide the names of the patients.

(ii) The diseased employee must have contacts with these patients during the first twenty-one days of the patient's disease and he must develop the disease within not less than seven days and not more than twenty-one days of contact.

(iii) In this group, definite criteria cannot be established because contacts are of a very casual nature.

Directive 13.

Industrial and Communicable Diseases

Arising out of the appeals which have been received with respect to hospital staff being forced to be off work because of showing traces of salmonella infection in the hospital employment due to the operation of the Public Health Act, the Board has reconsidered its interpretation of the word "disability" as applied to the Workmen's Compensation Act and the following order has been made.

> "The Board on considering the question of interpretation in relation to "disability" directs that for interpretive purposes with respect to The Workmen's Compensation Act, disability shall not only represent physical disability, but also shall apply to a non-physically disabling condition which bars the employee from earning full wages where the condition is connected with the employment and medically certified."

This will mean that where a person employed in work which renders him subject to the terms of the Public Health Act and is forced to be off work because of a condition contracted from the employment, though not being disabled, he shall be entitled to compensation. Further, in any employment where an exposure creates a situation of physical danger to the individual and he is required to be taken out of that employment, if the employer cannot provide him with other work, he shall be entitled to compensation.

This would apply to the lead poisoning and radiation situation.

It must be clearly understood that in making this interpretation the Board realizes that it is doing so on the basis of equity in so far as those people who are forced to cease employment for a temporary period are concerned. At the same time it should be watched very carefully in order that the situation is not in any way abused.

June 2, 1978
C.E.F.

Directive 13A.

Situation 3

Compulsory pre-employment immunization procedures or other compulsory immunization before the accident takes place.

Background

An example of this situation is a student nurse who is required by the employer to have certain immunization prior to employment on the hospital wards. The committee feels there is a difference between a voluntary programme and an employer sponsoring a compulsory programme of immunization as a prerequisite to employment or as part of continuing employment. The Board Order dated December 26th, 1956 in a specific claim supports this contention. The immunization must be for the prevention of a disease or infection that is work related.

Recommendation

Entitlement shall be granted for any reaction from compulsory immunization procedures as a pre-employment requirement or as a compulsory part of the employment providing the immunization is for the prevention of a work related disease or infection. The cost of the immunization is not included in the entitlement.

June 2, 1978
C.E.F.

Directive 13B.

Situation 4

Prophylactic immunization after an accident to prevent tetanus consists of a single dose of tetanus human antisera in persons without prior immunization or a booster dose of tetanus toxoid in persons with prior immunization. Dr. McCracken's memorandum of October 25th, 1977 provides background material regarding immunization following an accident to prevent the onset of tetanus.

Recommendation

Entitlement shall be granted for a single dose of tetanus human antisera following a work accident in persons without prior immunization, or for a booster dose of tetanus toxoid in persons with prior immunization. The second and third doses of tetanus toxoid shall also be accepted when administered for those cases where there is a metallic foreign body embedded in soft tissue which is not removed (excluding surgical metallic foreign bodies), or in the case of a compound fracture which is considered to be potentially contaminated. Entitlement includes the cost of the dose(s) and any associated complications that may arise. No entitlement shall be granted to all other applications of immunization utilizing tetanus toxoid for the purpose of future immunization.

June 2, 1978
C.E.F.

Directive 13C.

Entitlement shall be granted for medication or injections administered to an employee who, as part of the occupation, has been exposed to a person suffering

Directive 13C.

Entitlement shall be granted for medication or injections administered to an employee who, as part of the occupation, has been exposed to a person suffering from an infectious disease provided a claim would have been accepted had the disease actually been contracted by the employee. Entitlement will also be granted to an employee exposed to a fellow employee who has had contact with such a disease and is considered to be a carrier. Entitlement may involve lost time due to necessary isolation or complications arising from the treatment. This policy covers only employees whose duties require them to come in contact with sick people.

November 17, 1978
4763 #11

Directive 14.

T.D.I. CLAIMS

Description:

Toluene Diisocyanate is a liquid chemical used in the plastics industries. It is a very reactive chemical with a pungent acrid odour, and has a significant vapour pressure. Claims for disability due to T.D.I. contact or inhalation may be received from those employed in the manufacture of T.D.I. and foam and other plastics using T.D.I., also from those employed in maintenance, construction or repair in plants were T.D.I. is used. Protective clothing and masks are generally provided where exposure to harmful concentration is anticipated.

Disability:

Disability results from either direct contact or from inhalation of harmful concentration. Generally, recovery is complete within a few weeks with no assessable P.D. There is no evidence that psychiatric disability arise from exposure. Rehabilitation may be required where pulmonary impairment develops or where developed sensitivity prevents re-employment in exposure.

Direct Contact Claims:

Skin irritation may result from accidental contact with the liquid T.D.I. Splashes to T.D.I. [sic] in the eyes will also cause acute injury and possible permanent disability. Both types of disability are easily diagnosed and claims of this type may be handled routinely as chemical burns. Allowance should be based on history of exposure to T.D.I. and the prompt onset of symptoms of eye or skin irritation. Sensitization of the skin does not appear commonly with T.D.I. contact.

Exposure to T.D.I. Vapours:

Exposure Levels: Exposure to .02 parts per million is a threshold limit value for workers exposed 8 hours per day, 40 hours per week. The characteristic pungent acrid odour becomes noticeable at .05 ppm and concentration of .05 and greater will produce irritation of the mucous membranes of eyes, nose and throat, in that order. Severity of disability is related to the concentration, length of exposure and preventive measures being taken. This is not an allegy situation but a chemical irritation. A density of .5 ppm was irritating to all human volunteers exposed.

Onset of Symptoms:

Depending on concentration and length of exposure, the onset of respiratory symptoms may not occur until several hours after exposure.

Diagnosis:

Many conditions related to inflammation or irritation of the mucous membranes have been reported: rhinitis, nasopharyngitis, sore throat, sinusitis, laryngitis, tracheitis, bronchitis, bronchiolitis, and pneumonitis. This condition may resemble a head cold or influenza and separation of occupational and non-occupational illness in exposed workers is difficult. Secondary infections may occur. Pre-existing conditions such as chronic bronchitis, hay fever and asthma may suffer aggravation. Complete recovery is the rule generally within a few days to a few weeks.

Claims Allowance:

Exposure to the harmful concentration of T.D.I. should be established. The presence of T.D.I. odour is an indication of harmful concentration. The preventive measures taken should be established. The onset of symptoms in relationship to time exposed is significant. Medical Aid only claims may be handled within the Units with the concurrence of the D.M.O. Compensation claims should be referred for medical opinon to the Consultant – Chest Diseases.

Extended Disability:

If disability exceeds four weeks, the claim should be referred back to the Consultant for consideration of specialist examination or H. & R.C. evaluation. Compensation should not be continued indefinitely on the basis of subjective symptoms of weakness or inability to work.

Psychiatric Changes:

Any suggestion of psychiatric changes, anxiety, psychosis, psychoneurosis or apprehension regarding return to employment should be referred to the Consultant immediately for individual assessment.

Permanent Disability:

Permanent Disability apart from pypersensitivity [sic] is not likely. Any indication of P.D. should be referred to the Consultant.

Respiratory Allergy and Sensitivity:

Following initial exposure and recovery, some workers exhibit recurrence of symptoms following further minimal exposure or exposure to other chemicals. Symptoms similar to bronchospasm or bronchial asthma may appear. These claims should be referred to the Consultant and if considered necessary, the Vocational Rehabilitation Branch may be asked to assist in locating alternative non-exposure employment.

Directive 15. Where T.D.I. exposure results in chest and respiratory disability they should continue to be dealt with by the Chest Services Branch as previously recommended. Where there are complications other than those associated with the chest and respiratory system supervison of such cases should be carried out by the Medical Branch with consultation where necessary with the Chest Services Branch.

All new cases should also be seen by Dr. Mastromatteo in view of his interest.

June 28/67

Directive 16.

1. That vibration-induced white finger disease be accepted as an industrial disease under Section 118 and Section 1(1)(L) of the Act as peculiar to and characteristic of a process, trade or occupation involving exposure to high frequency, rapid acceleration vibratory tools.
2. That based on medical advice, vibration-induced white finger disease be favourably considered when the following circumstances apply:
   (a) There is a clear and adequate history of two or more years continuous employment on high frequency, rapid acceleration vibratory tools immediately preceding the onset of vasospastic response, and
   (b) The condition has been confirmed on medical examination by a specialist consultant in vascular disease.
3. Where the Board's Industrial Medicine Consultant recommends that the employee be removed from exposure employment, due to this specific condition, payment of disability benefits may be considered so long as this disease persists. Normally, this benefit would consist of temporary partial disability benefits and Vocational Rehabilitation Services where this need is identified.
4. A permanent disability award may be considered for this condition two years after a definite diagnosis has been made.
5. Claims which do not meet the criteria set out in 2.a, should be individually judged on their own merit having regard to the nature of the occupation, the extent of the exposure, and other factors peculiar to the individual case. Consideration will be given where it seems evident that the vibration-induced white finger disease resulted from occupational exposure to high frequency, rapid acceleration vibratory tools. The benefit of reasonable doubt applies.

January 10, 1978
Bd.M. 4709 #6

Directive 17.

Claims For Laryngeal Cancer in Industry Related to Asbestos Exposure and Nickel Exposure

1. That laryngeal cancer in workers occupationally exposed to asbestos fibre and/or to nickel aerosol in specific industrial processes be accepted as an industrial disease under Section 118 and Section 1(1)(L) of theActaspeculiartoandcharacteristicofsuchprocesses.

2. That based on medical studies, claims for laryngeal cancer be favourably considered under the following circumstances:

2.1 Any industrial process in the nickel industry which produces nickel in aerosol dispersion whether in combined or elemental form. This may include the following:
- Roasting
- Smelting
- Refining
- Welding
- Electroplating

2.2 Any occupation in which there is a clear and adequate history of occupational exposure to asbestos dust, and while such occupational exposure cannot be quantitatively described, it should be of continuous and repetitive nature and should represent or be a manifestation of the major component of the occupational activity.

3. **DURATION OF EXPOSURE**

3.1 **Nickel** – an accumulative minimum of 15 years exposure to nickel aerosols as defined in 2.1.

3.2 **Asbestos** – an accumulative minimum of 10 years proven exposure as defined under 2.2.

3.3 **Nickel and Asbestos** – an accumulative minimum of 7.5 years nickel as well as 5 years asbestos exposures in the case of dual exposure.

4. **INCEPTION PERIOD**

4.1 **Nickel** – this shall be a minimum of 20 years from the commencement of the first hazardous exposure.

4.2 **Asbestos** – this shall be a minimum of 20 years from the commencement of the first hazardous exposure.

4.3 **Nickel and Asbestos** – this shall be a minimum of 15 years from the commencement of the first hazardous exposure.

5. Claims which do not meet the guidelines should be individually judged on their own merit having regard to the intensity of exposure and other factors peculiar to the individual case. The benefit of reasonable doubt applies.

May 4/78
Bd.M. 4731 #5

SCHEDULE 3(5)

Directive 1.

Caisson Disease and Long Delayed Bone Changes

It is now recognized clinically and radiologically that Caisson Disease may produce long delayed bone changes, due to the fact nitrogen bubbles act as emboli in the vascular channels of the bones, resulting in this long delayed bone change. It is further recognized that it does not require a serious or near fatal Caisson Disease to result in bone change. It is not always possible to establish an actual accident; such as evidence of "bends" occurring. It should be pointed out that Caisson Disease is an industrial disease under Schedule 3 and the presumption applies where the employee is employed in compressed air.

The Board, therefore, is satisfied that the following should be the method of handling claims involving such long delayed bone changes:

(1) There must be confirmation that the employee performed occupational duties under compressed air.

(2) Once Part 1 has been established, then the claim should be sent immediately to the Surgical Consultant, who along with the Board's Radiologist should then take over the conduct of the case until its establishment as a claim under the Act.

(3) The Surgical Consultant is empowered to seek all the consultant opinion he considers necessary to arrive at a definite conclusion in any specific case.

January 23/61

SCHEDULE 3(6)

Dermatitis Venenata

Directive 1. The Board approves the policy outlined by the conference of dermatologists on Ismorphic Response in Psoriasis or Koebner's Phenomenon of Psoriasis held on the 3rd day of October, 1963, at which were present Doctors Norman Wrong, William Garbe, B.M. Sanders, J.W. Goodman, Marvin G. Lester, J.L. Johnston, R.K. Muir, and Mrs. Mashtalar as Recording Secretary, namely:

(a) Psoriasis is recognized as a pre-existing systemic or cutaneous disease with integumentary manifestations, and trauma, occupational, mechanical or inflammatory, may be a trigger factor which makes the disease clinically apparent at the site of the trauma, and on occasions spreading to other areas, and this isomorphic response in psoriasis represents an aggravation of the pre-existing disease state.

(b) Because of the varied clinical appearances of the skin involved in this recalcitrant integumentary disease, it is necessary to depend upon a clinical diagnosis, and where diagnostic problems are encountered, reference to an outside consultant or consultants is to be made and a decision as to the employee's entitlement reached on the weight of consultant opinion.

(c) Each claim is to be handled on its own merits and

- (i) compensation is to be paid in relation to the degree of disability to the point at which the employee's skin condition reaches the point of improvement that he is no longer considered to have a functional disability such as relates to the integumentary disease, and where clearing is unobtainable, a final settlement is to be reached as is done in claims of occupational dermatitis;
- (ii) where isomorphic response in psoriasis exists and is non-disabling, medical aid may be allowed for a reasonable time not exceeding twenty-four months.

May 4/64

Directive 2. (1) Every claim for occupational dermatitis is to be referred for adjudication to the Section Medical Adviser [sic] in consultation with the Industrial Medicine Specialist.

- (i) Investigation of exposure, examination at the Board's Toronto Office, or referral to a consulting dermatologist may be ordered.

(2) Where the employee is under the care of a general practitioner and medical treatment continues for more than four weeks, the claim is to be referred to the Section Medical Adviser [sic] for direction and consideration of possible referral to a dermatologist.

(3) Every prolonged claim for occupational dermatitis, where active treatment is still being rendered three months after onset of the dermatitis, is to be referred to the Industrial Medicine Specialist, and where he considers it advisable, to the Board's Consultant in Dermatology, and further investigation, including hospitalization, may be ordered as necessary.

(4) The procedure outlined in suborder (3) is to be repeated each three months as long as active treatment continues, unless otherwise indicated by the Industrial Medicine Specialist.

(5) Continuing entitlement is recognized in claims where acute occupational dermatitis resulting from exposure to primary irritants which destroy the natural protective mechanisms of the skin is complicated by the development of a lack of resistance to other irritants such as soap and water, or the development of a dyshidrosiform type of eruption on the hands.

(a) In such claims, the employee may receive temporary disability allowance for a period not exceeding one year, the amount being determined by the actual loss of earnings, or from an estimate of his impaired earning capacity.

(b) Where the secondary irritation is still causing disability or otherwise impairing his earning capacity at the end of a year, a final settlement, including medical aid, is to be considered, and where the condition is likely to be protracted, a pension award is to be made.

(c) The pension award is to be based on an estimate of the loss of earning capacity with review in one or two years, and where the patient is 60 years of age or over and had been disabled at least three years since the onset of the occupational contact dermatitis, a life pension may be awarded with review at intervals of two years.

(d) The principle of settlement is to be explained to the employee at the time of rating.

(6) Where the employee has to accept different work in order to avoid exposure to the offending substance and this move results in an impairment of earning capacity, a temporary partial lump sum or, where one year has elapsed since removal from exposure, a limited pension based upon the decreased [sic] in earnings, is to be paid for a limited period of up to two years with review at the end of that time.

(7) It is recognized that elimination from the patient's environment of the offending substance, either the primary cause of the dermatitis, or a secondary irritant, may be important to the employee's continued wellbeing, and where this requires a change of jobs, either during active treatment or after pensioning, the co-operation of the Rehabilitation Branch is to be sought.

(8) At the time of rating for permanent disability, the employee's entitlement for continuing medical aid is to be defined by the Industrial Medicine Specialist in consultation with the Board's Consultant in Dermatology.

May 9/63

SCHEDULE 3(8)

Directive 1.

Pension awards in Pneumoconiosis Claims

It has been our practice in silicosis, asbestosis and other pneumoconiosis claims to make the PD award effective from the date of the disabled employee's examination by the Advisory Committee. This seems inconsistant with the handling of other industrial diseases such as industrial deafness, where the awards are dated from the date the claim was reported to the Board. It also seems unfair to the injured employee that we use the date of examination by the Advisory Committee as there usually is some delay before he is examined by the Committee.

I have reviewed some of the literature regarding silicosis claims and the only reference to using the Advisory Committee's examination date as the date of disablement is contained in a memo to Mr. Cross from Mr. G.R. Poole dated February 3, 1953, copy attached. The reference in that particular memorandum to this matter was in regard to the earnings basis used in pneumoconiosis claims.

Recommendations

Using the Advisory Committee's examination date as the date from which the pension be paid, was probably an adequate method of arriving at the pension starting date prior to January 1, 1974 when an injured employee had to be out of the industry before being eligible for an award. However, since January 1, 1974 awards are payable whether or not the employee remains in the industry provided pneumoconiosis has been diagnosed by the Advisory Committee. To ensure consistancy with adjudication of other industrial disease cases, the following recommendations are being made with regards to the effective date of pension awards in pneumoconiosis claims:

April 16/75

(1) When the initial examination by the Advisory Committee confirms a diagnosis of pneumoconiosis, the pension award should be dated from the date the x-ray, showing abnormalities, was taken which prompted the submission of the claim to the Board.

(2) In cases where the initial Advisory Committee examination does not confirm pneumoconiosis is present and a subsequent examination diagnoses pneumoconiosis, the pension award should be dated from the date of the subsequent examination which confirms the diagnosis or earlier date recommended by our Medical Branch based on the Advisory Committee findings.

(3) Where it seems more reasonable to start a pension at a date earlier than the date of the x-ray which prompted submission of the claim to the Board, this can be done with Medical Branch approval.

June 16/75

Directive 2. The procedure in silicosis and pneumoconiosis claims is to be as follows:

(a) After the Claim has been assembled and the required exposure established, the employee is to be examined by the Advisory Committee on Occupational Chest Diseases.

(b) After the examination, the Advisory Committee on Occupational Chest Diseases is to submit a report in which is shown,

(i) the date of examination
(ii) a brief history of the employee's employment
(iii) his complaints at the time of the examination

(iv) a concise description of his physical condition
(v) a reading of the x-ray film
(vi) the percentage rating of the employee's disability

(c) The report is to state the percentage rating as determined by the unanimous opinion of the members of the Advisory Committee on Occuptional Chest Disease and where disability is not established shall state so.

(d) The percentage ratings are to be based on clinical findings, but where special consideration is considered warranted, the circumstances are to be outlined.

December 7/55

(e) Where there may be a change in the percentage rating or where further examination is desired for any reason, the Advisory Committee on Occupational Chest Diseases is to indicate when the claim is to be reviewed.

Directive 3. On and after the 21st day of November, 1951, where an award for silicosis in an ante-primary stage of $500.00 or in the primary stage of $1,000.00 has been made, it is to be disregarded when the claim is reopened and additional award is made.

Directive 4.

Recommendation

That the rating applied by the Advisory Committee on Occupational Chest Diseases be accepted.

February 22/68

Directive 5. The principle of allowing claims for silicosis, where there is no exposure to silica dust after the 8th day of April, 1926, and where the date of disability occurs after that date is approved.

Directive 6.

ELIGIBILITY ELLIOT LAKE PROGRAMME

1. (1) Under this programme, miners eligible for assistance will be "4" ratings (pre-silicotic) and "5" ratings (silicotics with or without a rated disability).

(2) Most of the "5" ratings now have surface jobs and the small number who remain at work underground will, in all probability, elect to remain at that occupation.

(3) Including the remaining "5" ratings, plus the known "4" ratings (determined by x-ray examination and findings) it is expected that the total number involved will be approximately 80 miners.

(4) **Uranium miners with radiation exposure.** The Ministry of Natural Resources are currently drawing up a list of uranium workers who have had exposure. This list will include those miners who have accumulated a life-time exposure of 120 working level months or more; in conjunction with this, they are also compiling lists of miners who have accumulated more than four working level months in 1975 to date. It is understood that it will require several months to complete these lists. When the lists of the miner's names are available, they will be contacted, since they are also eligible under this programme. At the present time there is no estimate as to the number of miners which may be involved in these two groupings.

(5) The maximum exposure level of 2 WLM per quarter and 4 WLM per annum for uranium miners and mill workers be accepted as the criterion in the allowance of such claims for the payment of temporary compensation while the employee is obliged to remain out of exposure employment as provided by the Atomic Energy Control Board regulations dated January 16, 1978 published in the Canada Gazette.

November 17, 1978
4762 #10

SCHEDULE N

[excerpted from Ontario's *Workers Compensation Act]*

...

86p. ***Industrial Disease Standards Panel.*** (1) There is hereby constituted a panel to be known as the Industrial Disease Standards Panel.

(2) The Panel shall be composed of not more than nine members including persons representative of the public and of the scientific community and technical and professional persons.

(3) The members of the Panel shall be appointed by the Lieutenant Governor in Council one of whom shall be designated by the Lieutenant Governor in Council as chairman of the Panel and one of whom shall be designated by the Lieutenant Governor in Council as vice-chairman.

(4) The remuneration, benefits and allowances of the members of the Panel shall be determined by the Lieutenant Governor in Council.

(5) The chairman of the Panel, subject to such guidelines as may be established by the Management Board of Cabinet and subject to the provisions of the *Crown Employees Collective Bargaining Act,* may establish job classifications, personnel qualifications and ranges for remuneration and benefits for officers and employees of the Panel, and the chairman may appoint, promote and employ the same in conformity with the classifications, qualifications and ranges for remuneration and benefits so established by the chairman.

(6) The costs and expenses associated with the administration of the Panel, including the remuneration and expenses of its members, officers and employees, shall be paid by the Ministry of Labour and shall be chargeable by the Ministry to the Board and the costs and expenses shall form part of the administrative expenses of the Board.

(7) it shall be the function of the Panel,

(a) to investigate possible industrial diseases;
(b) to make findings as to whether a probable connection exists between a disease and an industrial process, trade or occupation in Ontario;
(c) to create, develop and revise criteria for the evaluation of claims respecting industrial disease; and
(d) to advise on eligibility rules regarding compensation for claims respecting industrial disease.

(8) The Panel may establish special panels to investigate matters arising out of its functions under subsection (7) and may appoint *ad hoc* members who are specialists in particular diseases and in industrial processes to such special panels which shall report thereon to the Panel.

(10) The Panel shall report its findings to the Board.

(11) Before accepting or rejecting any findings of the Panel, the Board shall publish in *The Ontario Gazette* a notice setting forth the nature of the findings and calling for comments, briefs and submissions thereon to be filed with the Board within sixty days of the publication of the notice or within such longer period as the Board may specify in the notice.

(12) Upon the expiry of the period allowed for the filing under subsection (11), the Board may accept the findings of the Panel with or without amendments or may reject the findings.

(13) Where the findings of the Panel are accepted under subsection (12) with amendments or rejected, the Board need not give any further notice under subsection (11).

(14) Where the Board accepts or rejects the findings of the Panel, notice of the Board's acceptance or rejection, with reasons therefor, shall be published in *The Ontario Gazette.*

(15) The Panel shall, after the close of each year, file with the Minister of Labour an annual report upon the affairs of the Panel, and the Minister shall cause a copy of the report to be laid before the Assembly if it is in session or, if not, at the next ensuing session.

...

SCHEDULE O

[Schedules B, C, and D to British Columbia's *Workers Compensation Act*]

SCHEDULE B

Section 6 (4)

Description of Disease	Description of Process or Industry
(1) Poisoning by:	
(a) Lead	Where there is an exposure to lead or lead compounds.
(b) Mercury	Where there is an exposure to mercury or mercury compounds.
(c) Arsenic or arsine	Where there is an exposure to arsenic or arsenic compounds.
(d) Cadmium	Where there is an exposure to cadmium or cadmium compounds.
(e) Manganese	Where there is an exposure to manganese or manganese compounds.
(f) Phosphorus, phosphine or due to the anti-cholinesterase action of organic phosphorus compounds	Where there is an exposure to phosphorus or phosphorus compounds.
(g) Organic solvents (n-hexane, carbon tetrachloride, trichloroethane, trichloroethylene, acetone, benzene, toluene, xylene and others)	Where there is exposure to organic solvents.
(h) Carbon monoxide	Where there is exposure to products of combustion, or any other source of carbon monoxide.
(i) Hydrogen sulphide	Where there is excessive exposure to hydrogen sulphide.
(j) Nitrous fumes (including silo-filler's disease)	Where there is excessive exposure to nitrous fumes including the oxides of nitrogen.
(k) Nitriles, hydrogen cyanide or its soluble salts	Where there is exposure to chemicals containing -CN group including certain pesticides.
(l) Phosgene	Where there is excessive exposure to phosgene including its occurrence as a breakdown product of chlorinated compounds by combustion.
(m) Other toxic substances	Where there is exposure to such toxic gases, vapours, mists, fumes or dusts.
2. Infection caused by:	
(a) Psittacosis virus	Where there is established contact with ornithosis-infected avian species or material.
(b) Staphylococcus aureus, Salmonella organisms, Hepatitis B virus	Employment where close and frequent contact with a source or sources of the infection has been established and the employment necessitates (1) the treatment, nursing or examination of or interviews with patients or ill persons; or (2) the analysis or testing of body tissues or fluids; or (3) research into salmonellae, pathogenic staphylococci or Hepatitis B virus.
(c) Brucella organisms (Undulant fever)	Where there is contact with animals, carcasses or animal by-products.
(d) Tubercle bacillus	Employment where close and frequent contact with a source or sources of tuberculous infection has been established and the employment necessitates (1) the treatment, nursing or examination of patients or ill persons; or (2) the analysis or testing of body tissues or fluids; or (3) research into tuberculosis by a worker who, (i) when first engaged, or, after an absence from employment of the types mentioned in these regulations for a period of more than one year, when re-engaged in such employment was free from evidence of tuberculosis; and

		(ii) continued to be free from evidence of tuberculosis for 6 months after being so employed (except in primary tuberculosis as proven by a negative tuberculin test at time of employment). In the case of an employee previously compensated for tuberculosis, any subsequent tuberculosis after the disease has become inactive and has remained inactive for a period of 3 years or more shall not be deemed to have occurred as a result of the original disability for the purpose of the Act, unless the worker is still engaged in employment listed above or the Board is satisfied that the subsequent tuberculosis is the direct result of the tuberculosis for which the worker has been compensated.
3.	Pneumoconiosis:	
	(a) Silicosis	Where there is exposure to airborne silica dust including metalliferous mining and coal mining.
	(b) Asbestosis	Where there is exposure to airborne asbestos dust.
	(c) Other pneumoconioses	Where there is exposure to the airborne dusts of coal, beryllium, tungsten carbide, aluminium or other dusts known to produce fibrosis of the lungs.
4.	Cancer:	
	(a) Carcinoma of the lung when associated with asbestosis	Where there is exposure to airborne asbstos dust.
	(b) Mesothelioma (pleural or peritoneal)	Where there is exposure to airborne asbestos dust.
	(c) Carcinoma of the larynx or pharynx associated with asbestosis	Where there is exposure to airborne asbestos dust.
	(d) Gastro-intestinal cancer (including all primary cancers associated with the oesphagus, stomach, small bowel, colon and rectum [excluding the anus], and without regard to the site of the cancer in the gastro-intestinal tract or the histological structure of the cancer)	Where there is exposure to asbestos dust if during the period between the first exposure to asbestos dust and the diagnosis of gastro-intestinal cancer there has been a period of, or periods adding up to, 20 years of continuous exposure to asbestos dust and such exposure represents or is a manifestation of the major component of the occupational activity in which it occurred.
	(e) Primary cancer of the lung	Where there is prolonged exposure to (1) aerosols and gases containing arsenic, chromium, nickel or their compounds; or (2) bis (chloromethyl) ether; or (3) the dust of uranium, or radon gas and its decay products; or (4) particulate polycyclic aromatic hydrocarbons.
	(f) Leukemia or preleukemia	Where there is prolonged exposure to benzene or to ionizing radiation.
	(g) Primary cancer of the skin	Where there is prolonged contact with coal tar products, arsenic or cutting oils or prolonged exposure to solar ultra-violet light.
	(h) Primary cancer of the epithelial lining of the urinary bladder, ureter or renal pelvis	Where there is prolonged exposure to beta-naphthylamine, benzidine, or 4-nitrodiphenyl.
	(i) Primary cancer of the mucous lining of the nose or nasal sinuses	Where there is prolonged exposure to dusts, fumes or mists containing nickel or the dusts of hard woods.
	(j) Angiosarcoma of the liver	Where there is exposure to vinyl chloride monomer.
5.	Heart injury or disease including heart attack, cardiac arrest or arrhythmia, disease of the pericardium, heart muscle or coronary arteries	Where the worker is employed as a firefighter.
6.	Asthma	Where there is exposure to (1) western red cedar dust; or (2) isocyanate vapours or gases; or (3) the dust, fume of vapours of other chemicals or organic material known to cause asthma.

7.	Extrinsic allergic alveolitis (including farmers' lung and mushroom workers' lung)	Where there is repeated exposure to respirable organic dusts.
8.	Respiratory irritation	Where there is excessive exposure to a gas, vapour, mist, fume or dust of a chemical or other material ordinarily causative of respiratory irritation.
9.	Metal fume fever . . .	Where there is exposure to the fume of zinc or other metals.
10.	Fluorosis	Where there is exposure to high concentrations of fluorine or fluorine compounds in gaseous or particulate form.
11.	Neurosensory hearing loss	Where there is prolonged exposure to excessive noise levels.
12.	Bursitis	Where there is excessive friction, rubbing or pressure on the bursa involved.
13.	Tenosynovitis, tendinitis	Where unaccustomed and repetitive use of the affected arm, hand, leg or foot is required.
14.	Decompression sickness	Where there is exposure to increased air pressure.
15.	Contact dermatitis	Where there is excessive exposure to irritants, allergens or sensitizers ordinarily causative of dermatitis.
16.	Vascular disturbances of the extremities	Where there is prolonged exposure to excessive vibrations at low temperatures.
17.	Radiation injury or disease:	
	(a) Due to ionizing radiation	Where there is exposure to ionizing radiation.
	(b) Due to non-ionizing radiation:	
	(i) conjunctivitis, keratitis	Where there is exposure to ultra-violet light.
	(ii) cataract or other thermal damage to the eye	Where there is excessive exposure to infra-red, microwave or laser radiation.
18.	Erosion of incisor teeth	Where there is exposure to acid fumes or mist.

SCHEDULE C

A monthly payment of $210 plus the following proportion of the difference between $210 and the monthly payment that would be payable using the formula set out in section 17 (3) (c).

Age of Widow at Date of Death of the Worker (In Years)	Proportion of the Difference Between $210 and the Monthly Payment That Would be Payable Using the Formula Set Out in Section 17 (3) (c)
40	1/11
41	2/11
42	3/11
43	4/11
44	5/11
45	6/11
46	7/11
47	8/11
48	9/11
49	10/11

[Note: $210 amount changed periodically by regulation pursuant to section 25 (4).]

SCHEDULE D

Non-Traumatic Hearing Loss

Complete loss of hearing in both ears equals 15% of total disability. Complete loss of hearing in one ear with no loss in the other equals 3% of total disability.

Loss of Hearing in Decibels Measured in Each Ear in Turn	Percentage of Total Disability	
	Ear Most Affected PLUS	Ear Least Affected
0-27	0	0
28-32	0.3	1.2
33-37	0.5	2.0
38-42	0.7	2.8
43-47	1.0	4.0
48-52	1.3	5.2
53-57	1.7	6.8
58-62	2.1	8.4
63-67	2.6	10.4
68 or more	3.0	12.0

The loss of hearing in decibels in the first column is the arithmetic average of thresholds of hearing measured in each ear in turn by pure tone, air conduction audiometry at frequencies of 500, 1,000 and 2,000 Hertzian waves, the measurements being made with an audiometer calibrated according to standards prescribed by the board.

SCHEDULE P

[excerpted from Workers Compensation Board of British Columbia, *Rehabilitation Services and Claims Manual*, 1984, revised 1986]

CHAPTER IV

COMPENSATION FOR INDUSTRIAL DISEASE

#25.00 **INTRODUCTION**

Compensation for an industrial disease is covered by Section 6 of the Act. Subsection (1) provides:

> "Where
>
> (a) a worker suffers from an industrial disease and is thereby disabled from earning full wages at the work at which he was employed or the death of a worker is caused by an industrial disease; and
>
> (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments, compensation is payable...as if the disease were a personal injury arising out of and in the course of that employment. Medical aid may be paid although the worker is not disabled from earning full wages at the work at which he was employed."

The elements of this provision are discussed in detail below, except for the definition of "worker" which was covered in Chapter II.

In addition to the general provisions in Subsection (1), there are special provisions in Section 6 for silicosis, pneumoconiosis, and other lung diseases. Section 7 contains additional provisions for industrial deafness.

#25.10 **"Suffers" from an Industrial Disease**

Compensation is only payable under Section 6(1) if the claimant suffers from an industrial disease.

In a Board decision, a worker, acting reasonably and upon medical advice, believed himself to be suffering from an industrial disease; and, acting reasonably and upon medical advice, withdrew from his work situation. The claim was allowed even though subsequent evidence indicated that the worker was not suffering from an industrial disease. In a case of this kind, the issue whether the worker is suffering from an industrial disease is judged not on the evidence available with the full benefit of hindsight, but on the evidence available to him and upon which he very reasonably acted at the time of withdrawing himself temporarily from his employment. On that evidence, he may be a person suffering from an industrial disease and entitled to be so treated.

On the other hand, no compensation is payable if the withdrawal rests upon medical advice predicting that further exposure to the conditions at work would create a serious risk of disease. This is so even though the medical advice comes from the Board itself. Compensation is payable for disablement from industrial disease, but not for preventive measures to avoid disablement.

Once the basic requirements of a compensable injury or industrial disease have been met, the Board can accept responsibility for preventive measures which are a normal part of the treatment of the resulting condition. For example, if a nurse were to prick her finger with a contaminated hypodermic needle, just used for injecting a patient suspected of having infectious hepatitis, the Board would pay for a gamma globulin injection. This would be so even if the actual needle prick itself did not require treatment. On the other hand, the Board would not pay for a measles injection simply because a nurse came in contact with a patient who had that disease. In one case, a laboratory assistant accidentally spilled over her hand blood from a patient infected with hepatitis. She already had an infected hangnail on that hand. The Board would not accept responsibility for the subsequent treatment with immune globulin as there was no evidence of her suffering an injury or industrial disease. The treatment was for the purpose of preventing the onset of a disease.

#25.20 **Meaning of "Industrial Disease"**

"Industrial Disease" is defined in Section 1 to mean "...any disease mentioned in Schedule B, and any other disease which the Board by regulation or otherwise may designate or recognize as an industrial disease..." "Disease" is defined in the same provision to include "...disablement resulting from exposure to contamination." The former definition is exhaustive. Any disease not designated or recognized by the Board or falling outside Schedule B is not compensable.

There are four ways by which the Board may recognize a disease to be an industrial disease. It may do so by including the disease in Schedule B in reference to a particular process or industry. It may designate or recognize a disease to be peculiar or characteristic of a particular process, trade or occupation, but without including it in Schedule B. It may declare a disease to be an industrial disease by regulation, or it may recognize a disease to be an industrial disease in an individual case, where the facts warrant it.

The difference between an injury and a disease is discussed in #13.10.

#25.21 **Industrial Diseases Listed in Schedule B**

Schedule B comprises two columns, the first setting out a list of diseases and the second a list of processes or industries. Each column relates to a different stage in the adjudication process. Schedule B is set out in Appendix 2.

The first stage is to determine whether the disease alleged is one that the Board recognizes as an industrial disease. This requirement is satisfied if the disease is listed in the first column of Schedule B, or if it is recognized by the Board under the rules set out in #25.22-24. It is not necessary that the conditions in the second column of Schedule B should be present.

It is not always recognized how difficult it is to reasonably confirm the diagnosis of many industrial diseases, particularly those of poisoning by the metals and compounds listed in the schedule. For example, the abdominal pain often associated with lead poisoning may not be distinguishable from abdominal pain arising from non-occupational causes. Both may appear the same to the worker and his physician. A high blood level of lead, while it does not rule out non-occupational causes of the pain, does reasonably confirm the diagnosis of lead poisoning. However, if the blood level is less than that generally associated with lead poisoning, and there are no other signs and symptoms typical of lead poisoning, it would probably be unreasonable to assume a diagnosis of lead poisoning. Similar problems may arise when claims are made for such common complaints as nausea or vomiting following exposure to one or more of the chemicals or conditions listed in Schedule B.

The second stage is to determine whether the disease from which the claimant is suffering is due to the nature of his employment. The second column of Schedule B simply relates to one method of establishing that. If the claimant is suffering from one of the diseases listed in the first column of Schedule B, and the conditions set out opposite to that disease in the second column of the schedule apply to the claim, there is a presumption that the disease is due to the nature of the employment. Where the conditions set out in the second column are not present, that simply means that there is no presumption. However, the Board must still determine on the evidence whether the disease was in the particular case due to the nature of the employment. (1)

Difficulties may also arise in determining whether the second requirement of Schedule B is satisfied. This often arises because of the use of such words as "excessive" or "prolonged". While the Board would like to define more precisely the amount and duration of exposure required instead of using these words, it is usually not possible. The exact amounts will often vary according to the particular circumstances of the work place and the worker, or may not be quantified with sufficient precision by the available research. However, while such words are of uncertain meaning, there is valid reason for inserting them. They do at least indicate that the amount and duration of exposure to a particular contaminant must be something more than minimal. Individual judgment must be exercised in each case to determine their meaning, having regard to the medical and other evidence available as to what is a reasonable amount or duration of exposure.

The Board may add diseases to, or remove them from, Schedule B by virtue of Section 6(4)(a), which provides as follows:

> "The Board may, on the terms and conditions and with the limitations the Board deems adequate and proper, add to or delete from Schedule B a disease which the Board deems to be an industrial disease, and may in like manner add to or delete from the said Schedule a process or industry."

The Board may, under this section, expressly impose limitations and conditions on the addition of a disease to Schedule B. These conditions or limitations may limit the recognition of the particular disease to cases where the claimant is covered or substantially covered by the second column of the schedule. This means that no claim will be considered in respect of that disease unless the claimant falls within the process or industry listed in the schedule or otherwise complies with the conditions or limitations laid down. At the present time, the only disease in Schedule B to which such limitations and conditions have been attached is gastrointestinal cancer. By virtue of a Board decision, a claim in respect of gastrointestinal cancer is not considered from workers who have not been exposed to asbestos fibres in the course of their employment or whose exposure to such fibres does not substantially have the duration, continuity and extent set out in the second column of Schedule B.

#25.22 Designation As Being Disease Peculiar to or Characteristic of a Particular Process, Trade or Occupation

Section 6(4)(b) provides that, "Notwithstanding paragraph (a), the board may designate or recognize a disease as being a disease peculiar to or characteristic of a particular process, trade or occupation on the terms and conditions and with the limitations the board deems adequate and proper".

The recognition of diseases in individual claims is normally carried out under the rule set out in #25.24 rather than under section 6(4)(b). To use the latter subsection is to create expectations for other persons employed in the particular process, trade or occupation besides the claimant. Recognition under that subsection should be just one step removed from inclusion of a disease in Schedule B. Although there would be no presumption that the disease arose out of the claimant's employment, there would be a tendency to assume that the employment had something to do with the causation of the disease.

#25.23 Diseases Designated or Recognized by the Board by Regulation

Pursuant to Section 1 of the Act, the Board has recognized the following as industrial diseases by regulation:

Chicken Pox
Food Poisoning
Infectious Hepatitis
Serum Hepatitis
Giardia Lamblia Infestation
Meningitis
Mononucleosis
Mumps
Ringworm
Rubella
Scabies
Shigellosis
Staphylococci Infections
Streptococci Infections
Typhoid
Disablement from Vibrations
Whooping Cough
Bronchitis
Emphysema

It is important to distinguish between recognition of an industrial disease under Section 1 and the adding of an industrial disease to Schedule B pursuant to Section 6(4). Where it appears to the Board that a disease is more likely to occur in a particular process or industry than elsewhere, it may be added to Schedule B. On the other hand, where it appears to the Board that a disease is sometimes due to the nature of an employment covered by the Act, but it does not appear that the disease is more likely to occur in a particular industry or process than elsewhere, the Board may designate or recognize the disease under Section 1.

Several of the above diseases are not likely to be due to the nature of any employment in which the worker was employed, except for hospital employees, or workers at other places of medical care.

Further diseases, other than those listed above, may be designated or recognized by the Board from time to time under Section 1.

#25.24 Recognition of Diseases in Individual Cases

The Board is empowered, in individual cases where it determines that the merits and justice of the case require it, to designate a disease as an industrial disease for the purpose of an individual claim. If this were not so, there would be no reasonable explanation for the inclusion of the words "by regulation or otherwise" in Section 1.

Where a claim is received reporting a disablement by disease and the disease shown is one that is not contained in Schedule B nor is it one that has previously been designated or recognized by the Board as an industrial disease, the Adjudicator is required to send the file to the Commissioners to consider and determine whether the disease reported is one which should be recognized by the Board as an industrial disease. However, he first investigates the claim and only refers it to the Commissioners if he considers that it is one that should otherwise be allowed. He will simply disallow the claim without referring it to the Commissioners in any other case.

If, following referral by the Claims Adjudicator, the Commissioners feel that they might not recognize the disease as an industrial disease, they will first advise the claimant and give him a chance to respond.

Where the Commissioners decide to recognize the disease, the file is returned to the Adjudicator to determine all other issues relevant to the claim, including whether the particular claimant has the disease claimed and whether it resulted from his employment.

The declaration of an industrial disease by regulation does not preclude the application of Section 1 to the same disease in cases arising prior to the declaration.

#25.30 Disabled from Earning Full Wages at Work

Except in the case of medical aid, no compensation is payable to a worker in respect of an industrial disease unless he is disabled from earning full wages at the work at which he was employed.

Section 6(2) provides that "The date of disablement shall be treated as the occurrence of the injury".

For administrative purposes, such as assigning a claim number, the date of the worker's first seeking treatment by a physician or qualified practitioner for the industrial disease is the one used. Where the worker's condition was not at that time diagnosed as an industrial disease, the relevant date is the date the industrial disease is first diagnosed. These dates may also, in the absence of evidence to the contrary, be used as the date of disablement for the purpose of determining compensation entitlement. However, where evidence is available as to when the claimant first lost earnings because of his condition, that must be treated as the date of disablement for this purpose. That date is the one on which the time for submitting an application for compensation begins to run under Section 55 (2) and the claimant's earnings are calculated under Section 33. (3)

There is no definition of "disability" in the Act; but there is no reason why the words "suffers" and "disabled" should be limited to direct physical consequences. To be "disabled from" does not necessarily have a different meaning from being "unable to". The meaning of "disabled from" must be determined by the Board having regard to the policy objectives of the Act. If a worker is, as a result of an industrial disease, unable to continue working in her employment, then there is no reason why it should make any difference whether that results from the direct physical consequences of the disease on the worker, or the need to exclude her from employment for the protection of others.

In a Board decision, the claimant worked at a hospital and sustained a staphylococcal infection at her place of employment. The claimant was not incapacitated in any way by the infection. On the contrary, she felt fine, and felt like working; but the infection made her a carrier of staphylococcus, and she was precluded from working by a decision of the employer, the basis of the decision being that it was necessary to prevent the infection of others, particularly patients at the hospital. In those circumstances the claimant was disabled from earning full wages at the work at which she was employed.

A change of employment or lay-off from work for the purpose of precluding the onset of an industrial disease which does not yet exist is not compensable. (4)

If a condition is recognized as an industrial disease due to the nature of a worker's employment, the acceptability of the claim is not affected simply because there may be minimal effects from the disease. However, in assessing the compensation payable following acceptance of the claim, the minimal nature of the effects will be taken into account. Only medical aid will be payable, for instance, if the effects do not cause a disablement from work.

#25.40 The Disease is Due to the Nature of any Employment

Section 6(1)(b) requires that the disease be due to the nature of any employment in which the worker was employed. This is usually presumed where the disease is listed in Schedule B of the Act.

#25.41 Schedule B—Presumption

In Schedule B, opposite to each of the listed diseases, there is printed a particular process or industry. Section 6(3) of the Act provides that "If the worker at or immediately before the date of disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved."

As long as a claimant is employed full time in the industry mentioned in the second column of Schedule B, then whether the disease comes on at home, on the job, while away on holidays, or while attending some function indirectly related to work, the claimant is indeed "employed" in the sense intended by Section 6(3). The words "immediately before" are intended to deal with those situations where someone who has been employed for a long period of time in the applicable process or industry under Schedule B, and who has left that employment a very short time prior to the onset of the related disease or injury, might still be entitled to compensation.

Just as the Board is empowered to add or delete diseases to and from the schedule, it is authorized to add or delete any process or industry.

If a worker suffers from an industrial disease listed in Schedule B but is not employed in the industry or process listed opposite to it, the presumption does not apply and evidence will have to be produced showing that the disease is due to the nature of his employment. (5)

#25.42 Disease Designated or Recognized Otherwise than under Schedule B

A disease which has been designated or recognized otherwise than under Schedule B is only compensable if it appears from the evidence in the particular case that the disease was due to the nature of any employment in which the worker was employed. The presumption referred to in #25.41 does not apply.

#25.43 Death or Disablement Prior to July 1, 1974

Where a worker's death or disablement occurred before July 1, 1974, one further condition must be satisfied. The disease must be due to the nature of any employment in which the worker was employed at any time within the twelve months previous to the date of disablement. (6) Where the Board is satisfied that disablement or death of a worker was caused by an industrial disease resulting from his employment in the province, it may, notwithstanding that disablement or death occurred more than twelve months from the date he ceased to be so employed, pay compensation under the Act. (7) This requirement does not apply to workers whose disability or death occurred after July 1, 1974, even though the exposure causing the disease took place before that date.

#26.00 NATURAL DEGENERATION OF THE BODY

It often happens that disability results from the natural aging process. No doubt the pace of the process and each aspect of it can be influenced by environmental circumstances and activity. Work, leisure activities, genetic factors, air purity, diet, medical care, personal hygiene, personal relations and psychological makeup are all factors that may influence the pace of many kinds of natural degeneration. Where the degeneration is of a kind that affects the population at large, it would be impossible for the Board to attempt a measurement of the significance of each occupation on each kind of degeneration to determine whether a particular occupation had any effect in advancing the pace of degeneration compared with other occupations, or compared with a life of leisure. Where a disease is of a kind that affects the population at large, it will not be designated by the Board as an industrial disease unless employment causation can be established.

If a worker is suffering from a kind of bodily deterioration that affects the population at large, it is not compensable simply because of a possibility that his work may be one of the range of variables influencing the pace of that degeneration. For the disability to be compensable, it must appear that the work activity brought about a disability that would probably not otherwise have occurred, or that the work activity significantly advanced the development of a disability that would otherwise probably not have occurred until later.

If a particular occupation involves some unusual activity, perhaps an unusual movement of an arm or a foot, and it appears that this activity continued over time has produced a disability from which the worker would probably not otherwise have suffered, that disability would be compensable.

For example, if a claimant has an injury to his knee and medical evidence indicates that this is caused by the use of stairs, it would not be compensable simply because the claimant uses stairs at work as well as at home and elsewhere; but if a claimant is a carpet layer who has for years been using his knee as a battering ram in the laying of carpets, an injury resulting from that activity would obviously be one arising out of the employment.

#26.10 Arthritis

#26.11 Osteoarthritis of the Spine

In a decision, the Board refused to designate osteoarthritic degeneration of the spine as an industrial disease. It was considered to be a natural part of the aging process. The Board will only review this position if any further evidence comes to light that osteoarthritic degeneration of the spine is significantly advanced by a particular occupation.

#26.12 Osteoarthritis of the First Carpometacarpal Joint

The Commissioners consider that osteoarthritis of the first carpometacarpal joint is a kind of bodily deterioration that affects the population at large and is not normally brought about or significantly advanced by any particular occupation. However, in a particular case, it was concluded that the evidence overwhelmingly supported the conclusion that the claimant's condition was brought about or significantly advanced by her particular employment. More particularily, the reasons for this conclusion were as follows:

1. The claimant practiced a type of physiotherapy, involving deep frictional massage, which required a circular grinding motion of the thumbs. This placed particular stress on the first carpometacarpal joint and brought about or significantly advanced the claimant's condition.
2. The claimant's osteoarthritis was confined to the first carpometacarpal joint of her thumbs. If osteoarthritis were also present in other parts of her hand or body, this would indicate that her condition was part of the natural aging process and not due to her employment.
3. The 18-year period between the claimant first commencing work as a physiotherapist and the onset of her present condition is a period of sufficient length of her employment to have had causative significance.
4. There was support in medical literature for the proposition that this type of osteoarthritis can result from repetitive and prolonged minor trauma.
5. There was no osteoarthritis in the hands of the other female members of the claimant's family. This was significant because osteoarthritis of the hands does have a strong genetic pre-disposition in females.
6. The osteoarthritis was not attributable to menopause as the claimant had not yet reached that state.

These reasons lead the Board to conclude that the osteoarthritis of the first carpometacarpal joint of both thumbs suffered by this claimant was a result of her particular employment. The claimant's occupation was one involving an unusual activity which, continued over time, produced a disability from which she otherwise would not have suffered.

Osteoarthritis of the first carpometacarpal joint of both thumbs was recognized, pursuant to Section 6(4)(b) of the *Worker's Compensation Act*, (8) as being a disease peculiar to or characteristic of the claimant's occupation as a physiotherapist. This recognition was limited to factual situations which are substantially the same as this claim. In other words, the six reasons for accepting the claim referred to above would have to substantially apply.

#26.13 Rheumatoid Arthritis

In a Board decision, there was insufficient medical evidence to establish a casual [sic] connection between the worker's employment and the onset of his rheumatoid arthritis. It was the conclusion of the Commissioners, therefore, that the Board could not on the basis of current medical evidence, recognize rheumatioid arthritis as an industrial disease. (9)

#26.20 Heart Conditions

Heart attacks which arise out of and in the course of a person's employment are generally treated as personal injuries. They are therefore adjudicated in accordance with the rules set out in Chapter III. (10) However, the following entry is found in Schedule B.

Description of Disease	Description of Process or Industry
Heart injury or disease, including heart attack, cardiac arrest or arrhythmia, disease of the pericardium, heart muscle or coronary arteries.	Where the worker is employed as a firefighter.

The result of this provision is that, where the claimant is employed as a firefighter, claims for heart attacks or other heart conditions are treated as claims for industrial disease.

The plain and obvious meaning of this provision in Schedule B, in conjunction with Section 6(3), is that where a claimant has suffered an injury to the heart while employed (but not necessarily engaged in the work of) a firefighter, then the statute directs the Board to conclude that the injury was due to the nature of that employment, unless the contrary is proved. Evidence to the contrary is not by itself "proof" for the purposes of this section.

All claims filed for myocardial infarctions suffered by those employed as firefighters are allowed without the need for any further evidence being brought forward indicating that the problem in fact arose out of the activity of firefighting. Should sufficient evidence be brought forward that demonstrates an entirely outside cause of the heart attack, then that would amount to "proof" of the contrary and the claim, on that basis, could properly be disallowed.

#27.00 CONTAGIOUS DISEASES

For the contagious diseases recognized by the Board as industrial diseases, see #25.23.

A worker is not entitled to compensation simply because he contracted the disease while at work. For the disability to be compensable, there must be something in the nature of the employment which had causative significance. Thus, in these cases of contracting a contagious disease at work, it is a requirement for compensation that either:

1. The nature of the employment created for the worker a risk of contracting a kind of disease to which the public at large are not normally exposed; or
2. The nature of the employment created for the worker a risk of contracting the disease significantly greater than the ordinary exposure risk of the public at large. In this category, it would not be sufficient to show only that the worker meets more people than workers in other occupations, but it would be significant to show that in the particular employment he meets a much larger proportion of people with the particular disease than are found in the population at large.

It may help to illustrate these principles.

Example 1 – Suppose an outbreak of smallpox is affecting the community at large. The disease may be spreading at places of work, in the home, at schools, at churches, at social events, at sporting events, and every place where people meet. The Board would not, with regard to each worker suffering from the disease, seek evidence to decide whether that worker contracted the disease at work or elsewhere. The disease would be viewed as a public health problem, not a disease due to the nature of any particular employment, and compensation for the workers involved must be found under general systems relating to sickness benefits, not under workers' compensation.

Example 2 – Suppose there are three cases of smallpox reported in the community. Victim 1 is an immigrant from abroad. Victim 2 is a nurse who was engaged on the treatment of Victim 1. Victim 3 is a nurse who was working closely with Victim 2. Here the employment involved a risk of contracting a disease of a kind to which the public at large are not exposed, and the contracting of the disease by Victims 2 and 3 was due to the nature of their employment.

Example 3 – Suppose the disease is one of a low order of contagiousness, and one that does not normally spread through the public at large, but which can be contagious when there is exceptionally close contact, such as may come from two workers constantly holding materials together, or sharing the same room. If, in this situation, a worker catches the disease from a fellow worker, his employer, or a client of his employer, with whom he has been placed in exceptionally close proximity, it may well be concluded that the disease is due to the nature of the employment. Scabies may be an example in this category. Another example would be where two workers share sleeping quarters on board a ship, and one contacts tuberculosis from the other.

Example 4 – Suppose a deliveryman catches influenza and claims compensation on the ground that in his job he meets more people than workers in most occupations and therefore has a greater risk of exposure to contagious diseases. Such a claim would not be allowed. The disease is one that spreads in the population at large, and claims of this nature cannot be allowed or denied by estimating the extent to which each employment involves mixing with the public.

Example 5 – Suppose a maintenance mechanic from British Columbia is sent by his employer to repair machinery in use by a customer in Asia. While there, he contracts a disease that is commonly found among the population at large in that country, but which is not a common disease in British Columbia. That would be compensable. The nature of his employment has exposed him to disease of a kind to which the people of this province are not normally exposed.

In all cases of disease, it is of course a requirement of compensation that the disease must be one that is listed in Schedule B, or that is otherwise recognized by the Board as an industrial disease.

There is no requirement that a claimant with a contagious disease should name a contact, but there should be some evidence either provided by the claimant or found by the initiative of the Adjudicator of a contact. For example, if the claimant worked in a hospital, and there were three patients known to be in his working area of the hospital suffering from the disease, an inference may be drawn from the circumstantial evidence that he contacted [sic] the disease there, even though he may not remember the names of them, or may not remember whether he actually contacted them. The strength of this circumstantial evidence would obviously depend partly on the strength of evidence relating to alternative possibilities, such as whether the disease is extremely rare or one that is common in the community elsewhere. In other words, where there is no solid evidence of actual contact, the Adjudicator must still weigh the probabilities on the circumstantial evidence of possible contact and not simply reject the claim without weighing the probabilities.

#28.00 RESPIRATORY DISEASES

#28.10 Asthma and Respiratory Irritation

Compensation is not payable because a person contracts an allergy as a result of his employment. However, where an allergy results in asthma or respiratory irritation, the claimant is suffering from an industrial disease under Schedule B of the Act.

As the result of Section 6(1) of the Act, no compensation other than medical aid is payable unless the asthma or respiratory irritation disables the claimant from earning full wages at the work at which he was employed. If that is the case, wage-loss compensation is payable until any temporary disability terminates or the claimant's symptoms become stabilized. Where the claimant's symptoms are not entirely removed and he is left with a permanent impairment of his respiratory system, a disability award may be granted. However, no such award can be made when the claimant's symptoms have been removed and he is simply left with the allergy. Not only is he not now suffering from the industrial disease set out in Schedule B, but he is not disabled from working. The Board cannot grant a permanent disability award to a person who has the same physical capabilities as he had previous to the occurrence of the industrial disease, but is precluded from a limited number of occupations because of a remaining allergy.

Where a worker who is allergic to red cedar dust declines to take any employment which involved exposure to that dust, he is taking a preventive measure. Compensation is not payable for such preventive measures. However, rehabilitation assistance may be provided to a claimant in this situation.

#28.20 Bronchitis and Emphysema

Bronchitis and emphysema are recognized as industrial diseases under Section 1 of the Act.

Bronchitis and emphysema were recongnized by regulation as industrial diseases on July 11th, 1975. The fact that bronchitis and emphysema were recognized by regulation does not improve or diminish their status under the Act. It merely advises the working community that the Board has taken note of the possibility that bronchitis and emphysema may arise as a result of employment environments; but, unlike diseases included in Schedule B, in every case where this is alleged, evidence must be advanced to show that this is so. The declaration of an industrial disease by regulation does not preclude the application of Section 1 to the same disease in cases arising prior to the declaration. It must be emphasized, however, that medical evidence in general on this subject would indicate that it would be an extremely rare case where a worker's environment could be shown to be the cause of the disease.

Where a person claims compensation in respect of bronchitis and emphysema, the Board considers that a history of heavy or significant cigarette smoking raises a strong inference that his condition is due to the smoking and not to the nature of his employment. Against this inference must be weighed any evidence which supports the claim, but the inference will not be rebutted where the opposing evidence is weak and conflicting.

The principles set out above do not mean that a claimant who has never smoked cigarettes or has smoked an insignificant amount will automatically be compensated for any bronchitis and emphysema. Evidence will still have to be produced that his disease is due to the nature of his employment. The advantage such a claimant will have is that a major non-industrial cause of these diseases will have been eliminated.

#28.30 Silicosis

A worker in the metalliferous-mining industry or coal-mining industry who becomes disabled from uncomplicated silicosis or from silicosis complicated with tuberculosis is entitled to compensation for total or partial disability. Where death results from the disability, the dependants of the worker are entitled to compensation. However, neither a worker nor a dependant is entitled to compensation for the disability or death unless the worker:

(a) has been a resident of the province for a period of at least three years last preceding his disablement, or unless at least two thirds of his exposure to dust containing silica was in this province; and

(b) was free from silicosis and tuberculosis before being first exposed to dust containing silica in the metalliferous-mining or coal-mining industry in this province; and

(c) has been a worker exposed to dust containing silica in the metalliferous-mining or coal-mining industry in the province for a period or periods aggregating three years preceding his disablement, or for any lesser period if the worker was not exposed to dust containing silica anywhere except in this province. (11)

"Silicosis" is defined as "...a fibrotic condition of the lungs caused by the inhalation of silica dust" (12) and "metalliferous-mining industry" is defined to include "the operations of milling and concentrating,...but not any other operation for the reduction of minerals". (13)

#28.31 Meaning of "Disabled" from Silicosis

The restrictions contained in Section 6(1) do not apply to silicosis. It is, therefore, not a requirement of a claim for silicosis that there should be a lessened capacity for work, or that the worker should be disabled from earning full wages at the work at which he was employed.

It is, however, a requirement in a claim for silicosis that the worker must be "disabled" from the silicosis, or from silicosis complicated with tuberculosis. There is no definition of "disability" in the Act, and the Board has not attempted any comprehensive definition. All that has so far been decided is that if a worker has a condition of an internal organ which is so slight as to be unnoticeable to the person concerned, and which causes no significant discomfort or other ill effects, that is not a "disability".

That a worker has been refused a certificate of fitness does not mean that he is "disabled" for the purposes of the Act. The certificate may have been refused a worker who does not have silicosis as a preventive measure where tests show that he is vulnerable to the disease.

It can be difficult to fix the date for commencing the pension when there is no change of jobs or reduction in earnings to mark the inception of the disability. No general rules can be laid down for this purpose. The Adjudicator must decide the question according to the available evidence. However, if the evidence does not clearly establish when the disability commenced, and there is no evidence of the existence of a disability prior to the receipt of a particular medical report, the Adjudicator may properly decide that, according to the available evidence, the disability commenced on the date of the medical examination which was the subject of that report.

There may also be a difficulty in fixing the claimant's average earnings when he is not employed at the time when his disability commenced. The Commissioners consider that the Adjudicator should generally refer back to the employment or employments in which the claimant was most recently engaged and base the pension on the previous earnings thus discovered.

#28.32 Disablement from Silicosis Prior to July 1, 1974

Where disablement from silicosis took place prior to July 1, 1974, one further condition must be satisfied. The worker must have filed a claim for compensation while usually and regularly employed in the metalliferous-mining or coal-mining industry in this province, or have made and established his claim for potential disability within five years after the date of leaving such employment in this province, and in either case within one year after the date on which he became disabled. This provision does not prevent allowance by the Board of any case due to silicosis that the Board considers should in justice be allowed. (14) These provisions override the general time limits on applications for compensation discussed in #93.21. They do not apply to workers whose exposure to silica dust was wholly or partly prior to July 1, 1974, but whose disablement occurred on or after that date.

#28.33 Exposure to Silica Dust Occuring Outside the Province

Where the three criteria set out in #28.30 are met, there will be no reduction in benefits according to the proportion of exposure to silica dust occurring outside the province versus that within. The Board will therefore pay full compensation to the claimant without regard to the extent of exposure to silica dust outside the province.

#28.34 Silicosis Agreements

Section 6(6) provides that "The board may, subject to the approval of the Lieutenant-Governor in Council, enter an agreement either with Canada or with the appropriate authority in another province, providing for cooperation in all matters under this Act relating to a worker disabled by silicosis, and that agreement supersedes this Act to the extent necessary for the purpose of giving it effect."

Pursuant to this provision, an agreement was entered into on June 1,1972, with the Workmen's Compensation Boards of Alberta, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, Newfoundland and the Yukon Territory. On February 7, 1975, this agreement was also signed by the Workers' Compensation Board of the Northwest Territories. A separate addendum was entered into with the Ontario Workmen's Compensation Board which was effective July 1, 1973. These agreements are set out in Appendix 3.

#28.40 Pneumoconiosis

When a worker has sustained pulmonary injury by a disabling form of pneumoconiosis as a result of exposure to dust conditions that are deemed by the Board to have contributed to the development of the disease in employment in the province in an industry in which that disease is an industrial disease under the Act, he or his dependants is or are entitled to compensation only if he was free from pneumoconiosis and tuberculosis before being first exposed to those dust conditions in the province, and if his residence and exposure to the dust conditions have been of the duration required to entitle a worker to compensation for silicosis under #28.30. (15)

For workers whose disablement occurred before July 1, 1974 the position is the same as for workers becoming disabled from silicosis prior to that date and is set out in #28.32.

#28.50 Presumption Where Death Results from Ailment or Impairment of Lungs or Heart

Section 6(11) provides that "Where a deceased worker was, at the date of his death, under the age of seventy years and suffering from an industrial disease of a type that impairs the capacity or function of the lungs, and where the death was caused by some ailment or impairment of the lungs or heart of non-traumatic origin, it shall be conclusively presumed that the death resulted from the industrial disease." This provision does not apply to deaths occurring before July 1, 1974.

The question whether the deceased suffered from an "...industrial disease of a type that impairs the capacity or function of the lungs,..." is not determined by the failure or success of any claim made in his lifetime. Thus, the Board can decide that there was such a disease at the date of death, even though it rejected a claim made by the worker himself in respect of that disease. Alternatively, it can now conclude that there is no such disease, notwithstanding it accepted a claim made by the worker before his death in respect of the same condition. This can well happen because usually there is different evidence available following a death.

Once the age of the worker and the conditions set out in Section 6(11) have been established, it is conclusively presumed that the death resulted from the industrial disease. This presumption cannot be rebutted by contrary evidence.

If the deceased worker was over seventy years of age or for some other reason the presumption cannot be applied, medical and other evidence must be examined to determine whether the death resulted from the industrial disease.

#29.00 SKIN DISEASES

Schedule B lists "Contact Dermatitis" as an industrial disease. The process or industry listed opposite to it is, "where there is excessive exposure to irritants, allergens or sensitizers ordinarily causative of dermatitis".

The payment of wage-loss and permanent disability pensions are subject to the same general principles as are set out in #28.10 in respect of asthma or respiratory irritation. Therefore, there is no disability for the purpose of the *Workers' Compensation Act* unless the worker has an actual loss of body function or physical impairment resulting from his condition which prevents him from working.

Wage-loss benefits are payable while this impairment is a temporary one, but cease when it disappears or becomes permanent. In the latter event, a permanent partial disability is assessed. However, neither wage loss nor a pension is payable just because the worker has developed a susceptibility to react to a certain substance as a result of his work which causes periods of temporary impairment if he is exposed to the particular substance, but otherwise causes no complaints. Rehabilitation assistance will be provided to assist the worker in obtaining alternative employment which does not expose him to the substance in question.

#30.00 DISEASES CAUSED BY VIBRATIONS

A disablement caused by vibrations may be classified either as an injury or a disease, depending on the circumstances. The distinction is dealt with in more detail in #13.10-12.

#30.10 Raynaud's Phenomenon

Schedule B includes, in its list of industrial diseases, "vascular disturbances of the extremities". Opposite to that disease, in the second column of the schedule, the process or industry listed is, "where there is prolonged exposure to excessive vibration at low temperatures". This listing covers the disease commonly known as Raynaud's Phenomenon, Traumatic Vasospastic, or Vibration White Finger Disease.

Most compensable injuries and diseases involve an initial period of temporary disability during which wage-loss benefits are paid. This disability will usually improve in time until it disappears entirely or becomes permanent. However, in the case of some diseases, there is no initial period of temporary disability; the disability is permanent right from the beginning and no wage loss is payable. Raynaud's Phenomenon is one of these diseases. There are also others. For example, hearing loss caused by exposure to industrial noise. Only permanent disability awards are payable in respect of the disabilities caused by these diseases. Wage-loss benefits may be payable for Raynaud's Phenomenon in the exceptional cases where the worker's condition falls within Class 2 or above as described in #30.11.

#30.11 Assessment of Pensions for Raynaud's Phenomenon

To measure the extent of any permanent disability resulting from Vibration White Finger Disease, the evaluation is carried out in the following manner:

1. The Disability Awards Medical Advisor examines and classifies the worker in reference to the following table and states if the worker falls into Class 1, 2, 3, 4, or 5.
2. If the Disability Awards Medical Advisor classifies the worker in Class 1, and evidence from the Rehabilitation Consultant shows that the worker has not returned to his normal or equal paying occupation, then an award of 4% of total is granted. Section 23(3) of the *Workers' Compensation Act* will apply regarding the measurement of any impairment of earning capacity beyond 4%.
3. If the Disability Awards Medical Advisor classifies the worker in Class 1 and evidence from the Rehabilitation Consultant shows that the worker has returned to his normal or equal paying occupation, then no award is payable.

4. If the Disability Awards Medical Advisor classifies the worker higher than a Class 1, there will be other medical evidence which will assist in the determination of the disability. (16)

VARIABLE

Class	Traumatic Vasospastic Disease	Symptoms	Evidence of Vascular Damage
1	Exists alone	Moderate; short rest periods (minutes) necessary at work	None from physical, radiologic or arteriographic examination Normal findings or moderate changes demonstrated by UVD or DP
2	Exists along with any two or more of the findings	Severe, forbidding outside work or causing abandonment of job	Sclerodactyly Fingertip scars (healed ulcers) Bone changes and vacuoles Arterial occlusions visualized arteriographically Severe changes in some fingers demonstrated by UVD or DP
3	Exists along with any two or more of the findings	Severe with work outside or inside	Gangrene of one or more fingertips Healed amputation of one or more digits of one hand Severe changes demonstrated by UVD or DP
4	Exists along with one or more of the findings	Pain at rest at intervals in both hands	Amputation of two or more digits of two hands Amputation at or above one wrist with evidence of persistent vascular disease
5	Exists along with one or more of the findings	Severe, constant pain at rest in both hands	Amputation of all digits of both hands Amputation at or above the wrist of both hands with evidence of persistent vascular disease

#30.20 **Hearing Loss**

There are two ways in which compensation can be paid for hearing loss:

(a) If the hearing loss is traumatic, compensation is paid as with any other injury under Section 5(1) and, if a permanent disability results, a pension is awarded in accordance with the scale provided for in the Permanent Disability Evaluation Schedule.

(b) If the hearing loss has developed gradually over time as a result of exposure to industrial noise, it is treated as an industrial disease. However, the provisions of Section 6 do not apply unless the claimant ceased to be exposed to causes of hearing loss prior to September 1, 1975. In all other cases, Section 7 of the Act applies.

Section 7(1) provides that "Where a worker suffers loss of hearing of non-traumatic origin, but arising out of and in the course of employment..., that is a greater loss than the minimum set out in Schedule D, he shall be entitled to compensation..." Schedule D is set out in #30.24. The minimum figure is a loss of hearing of twenty-eight decibels in one ear.

#30.21 **Date of Commencement of Section 7**

Section 7(5) of the Act provides as follows:

> "Compensation under this section shall not be payable in respect of a period prior to September 1, 1975; but future compensation under this section shall be payable in respect of loss of hearing sustained by exposure to causes of hearing loss in the Province either before or after that date, unless the exposure to causes of hearing loss terminated prior to that date."

Section 7 expressly applies only to hearing loss of non-traumatic origin which can only mean loss of hearing over some period of time as a cumulative effect. It would therefore seem that "terminated"as used in Section 7(5) means the end once and for all of a course of exposure to causes of hearing loss. Exposure should not be seen as terminated as long as the worker continues to undergo such exposure arising out of and in the course of his employment in B.C., no matter how intermittent or how far apart periods of exposure might be. Only retirement from employment in industries which expose the worker to causes of hearing loss would then qualify as "termination". Therefore, subsequent exposure for any period of time in bonafide employment would allow for consideration of compensation under Section 7.

Section 7(5) does not specifically require that exposure to causes of hearing loss *in the province* should terminate prior to the effective date of the section. However, that wording is used earlier in the same subsection when describing the periods of exposure for which compensation will be computed. The Board is satisfied that it would be reasonable to presume that only exposure to noise in industries under Part 1 of the Act after the date of proclamation should be considered to determine whether or not a worker qualifies for compensation under the section.

If a worker's exposure to causes of hearing loss terminated prior to September 1,1975, no compensation is payable under Section 7, whatever may be the reasons for this termination. No exception can be made if, for instance, the termination came about because a previous compensable injury forced the claimant to leave his employment.

#30.22 Amount and Duration of Noise Exposure Required by Section 7

A claim is acceptable where, as a minimum, evidence is provided of continuous work exposure for two years or more at eight hours per day at 85 dBA or more, and when other evidence does not disclose any cause of hearing loss not related to work. The Board considers it reasonable to set the 85 dBA minimum standard for compensation purposes and then to allow a restricted measure of discretion for the acceptance of claims where the evidence is abundantly clear that the claimant is extraordinarily susceptible and has been affected by exposure to noise at a lesser level.

The Board does not accept evidence of the wearing of individual hearing protection as a bar to compensation. However, in the case of soundproof booths, where evidence shows that the booth was used regularly, was sealed and was generally effective, it would be difficult to accept that the work environment in question contributed to the hearing loss demonstrated.

Where the exposure to industrial noise in British Columbia is 5% or less of the overall exposure experienced by the worker, the claim is disallowed. Such a minimal degree of exposure is insufficient to warrant a pensionable degree of disability. Where the exposure to industrial noise in British Columbia is 90% or greater of the total exposure, a claim is allowed for the total hearing loss suffered by the claimant. For percentages between 5 and 90, the claim is allowed for only that percentage of the hearing loss which is attributable to industrial noise in British Columbia.

It has been suggested that after 10 years of exposure further loss is negligible. Generally speaking, the evidence is that the first 10 years has a significant effect at higher frequencies. However, where lower frequencies are concerned (up to 2,000 hz.) hearing loss continues after that time and may, in fact, accelerate in those later years. Therefore, since the disability assessment under Schedule D relies on frequencies of 500, 1,000 and 2,000 hz., no adjustment for duration of exposure should be made.

#30.23 Application for Compensation under Section 7

Section 7(6) provides that "An application for compensation under this section shall be accompanied or supported by a specialist's report and audiogram or by other evidence of loss of hearing that the Board prescribes".

Where a worker has already applied for compensation for hearing loss under Section 6, a separate application under Section 7 may sometimes be required. However, it will not be insisted upon if it serves no useful purpose. Therefore, no separate application need be made where all the evidence necessary to make a reasonable decision is available without it. On the other hand, although the worker need not submit an application form, he must still take some action to appeal or have his claim under Section 6 reconsidered under Section 7.

It is important to point out that the original application need not be accompanied by a report and audiogram by a physician outside the Board.

#30.24 Amount of Compensation under Section 7

No wage-loss payments are made to workers suffering from non-traumatic hearing loss.

New hearing-loss pensions are computed on the basis of the readings obtained from audiometric tests.

Where the loss of hearing amounts to total deafness measured in the manner set out in Schedule D, but with no loss of earnings resulting from the loss of hearing, Section 7(2) provides that compensation shall be calculated as for a disability equivalent to 15% of total disability. Where the loss of hearing does not amount to total deafness, and there is no loss of earnings resulting from the loss of hearing, Section 7(3) provides that compensation shall be calculated as for a lesser percentage of total disability, and, unless otherwise ordered by the Board, shall be based on the percentages set out in Schedule D. Schedule D is set out below.

SCHEDULE D

Non-Traumatic Hearing Loss

Complete loss of hearing in both ears equals 15% of total disability. Complete loss of hearing in one ear with no loss in the other equals 3% of total disability.

Loss of hearing in Decibels Measured in Each Ear in Turn	**Percentage of Total Disability**	
	Ear Most Affected PLUS	Ear Least Affected
0-27	0	0
28-32	0.3	1.2
33-37	0.5	2.0
38-42	0.7	2.8
43-47	1.0	4.0
48-52	1.3	5.2
53-57	1.7	6.8
58-62	2.1	8.4
63-67	2.6	10.4
68 or more	3.0	12.0

The loss of hearing in decibels in the first column is the arithmetic average of thresholds of hearing measured in each ear in turn by pure tone, air conduction audiometry at frequencies of 500, 1,000 and 2,000 Hertzian waves, the measurements being made with an audiometer calibrated according to standards prescribed by the Board.

In assessing permanent disability awards under Section 7, there is no automatic allowance for presbycusis. In some cases, however, the existence of presbycusis may be relevant in deciding whether the worker has suffered a hearing loss due to his employment. The age adaptability factor is not applied to awards made under Section 7.

Where a claimant has an established history of exposure to noise at work, but the amount of hearing loss determined by pure tone audiogram is out of proportion to the amount or extent of the noise exposure, the extent of Board responsibility will be determined through the use of "Robinson's Tables".

"Robinson's Tables" were statistically formulated to calculate the expected hearing loss following a given exposure to noise. In applying these tables, the cumulative period of noise exposure is calculated. A factor for aging is then added. For pension purposes, the resulting calculation is then compared on "Robinson's Tables" to the worst 10% of the population (i.e., at the same levels and extent of noise exposure, 90% of individuals will have better hearing than the claimant).

In some cases, it will be found that a worker has already suffered a conductive hearing loss in one ear, unrelated to his work, which might well have afforded some protection against work-related noise-induced hearing loss in that ear. The normal practice in this situation would be to allocate the higher measure in Schedule D (the "ear least affected" column) to the other ear which has the purely noise-induced hearing loss. Where there is a combined conductive and noise-induced hearing loss in both ears, the disability for which the Board is responsible may be assessed by using "Robinson's Tables".

A difficulty occurs where the claimant is not employed at the time when his disability commenced. If the Board followed its general practice in industrial disease claims of basing disability pensions on the claimant's "average earnings" at the date of his disablement, this could mean that no pension would be payable. However, this would not be a fair result. The worker has a loss of body function as a result of his disease for which he should receive compensation. If there are no current earnings on which to base the pension, the Adjudicator should generally refer back to the employment or employments in which the worker was most recently engaged and base the pension on his previous earnings thus discovered.

#30.25 Loss of Earnings Awards under Section 7

Where loss or reduction of earnings results from the loss of hearing, Section 7(4) provides that compensation shall be calculated by reference to the projected loss of earnings, or by another method of estimating loss of earnings or impairment of earning capacity that the Board adopts; but in no case shall the compensation be less than that provided under Subsection (2) or (3).

Compensation is not payable simply because a worker has changed his employment in order to preclude the development of hearing loss. As with any other industrial disease, there must be physical impairment from the disease before there can be compensation in any form. In other words, compensation is payable for a disability that has been incurred, not for the prevention of one that might occur.

Where a noise-induced hearing loss has been incurred, if a worker then changes his employment to a lower paid but quieter job, that triggers the commencement of compensation notwithstanding that it may seem reasonable that with hearing protection, he may have stayed at his old job. There is no obligation to stay in the employment with hearing protection rather than take lower paying work and claim compensation.

#30.26 Reassessment of Awards under Section 7

Where the loss of hearing of a person in receipt of a pension under Section 7 is retested, the procedure is as for the initial assessment of the pension. Where on retest, a different finding is recorded from that on which the initial pension was set, the following procedure has been adopted:

1. Where the retest records a deterioration in the claimant's hearing, the pension is increased if the new findings warrant an increase as per Schedule D of the Act.
2. If the retest suggests there is an improved level of hearing than that upon which the original pension was set, but the improvement is within a range, up to and including 10 decibels, no change in the worker's pension is undertaken.
3. If the retest shows an improvement in the claimant's hearing of a degree greater than 10 decibels, the worker's pension is reassessed on the basis of this new finding. Where this occurs, two further considerations would apply.
   - (a) Where the worker has been paid his pension in the form of a lump-sum payment, he is advised in writing that his hearing has improved to the point where such a payment would no longer appear justified or appropriate. However, in those cases, no attempt is made by the Board to seek a refund.
   - (b) Where the worker's pension is being paid in the form of a periodic monthly payment, such payments are reduced or terminated, whichever is applicable, and the worker is informed in writing as to the reasons for this action.

#30.27 Compensation for Non-Traumatic Hearing Loss under Section 6

A worker will only be entitled to compensation for non-traumatic hearing loss under Section 6(1) if his exposure to causes of hearing loss terminated prior to September 1, 1975. "Neurosensory hearing loss" is one of the industrial diseases listed in Schedule B of the

Act, the process or industry printed opposite to it being "where there is prolonged exposure to excessive noise levels".

Section 55 of the *Worker's Compensation Act* sets out the time limits within which an application for compensation for hearing loss must be filed. Subsection (4) of the present Section 55 states:

> "This section applies to an injury or death occurring on or after January 1, 1974, and to an industrial disease in respect of which exposure to the cause of the industrial disease in the Province did not terminate prior to that date."

The result of this provision is that where a claimant's exposure to causes of hearing loss terminated prior to January 1, 1974, the present Section 55 does not apply and one must look to the provision which was repealed on the enactment of this section.

Under the previous Section 55 (then numbered 52), a claim is barred unless an application for compensation, or in the case of medical aid, proof of disablement, is filed within one year of the claimant's "disablement" from industrial disease, and there is no power to extend this time. To determine what is meant by "disablement" in this provision, one must refer back to Section 6(1) of the Act which provides in part that no compensation, other than medical aid, is payable in respect of an industrial disease unless the worker is "...thereby disabled from earning full wages at the work at which he was employed..." The one-year time period under the previous Section 55 does not begin to run until the claimant becomes disabled from earning full wages within the meaning of Section 6(1). It follows that in cases where the exposure to causes of hearing loss terminated prior to January 1, 1974, and no disablement within the meaning of Section 6(1) has yet occurred, medical aid can always be provided, whether or not an application for compensation has been received from the worker and regardless of the length of time which has elapsed since his exposure terminated. Once the disablement from earning full wages occurs, the worker then has one year to submit an application for compensation (if he has not already done so) or proof of disablement. If no application for compensation or proof of disablement has been received by the end of this period, the worker's claim becomes completely barred even though he may previously have received compensation in the form of medical aid. If he submits proof of his disablement, but no application for compensation, by the end of this period only compensation in the form of medical aid is payable. (17)

#30.28 Commencement of Periodical Payments under Sections 6 and 7

The Board has issued the regulations set out below.

1. These regulations apply to claims for loss of hearing of non-traumatic origin.
2. Where compensation is being awarded under Section 6, then, subject to Section 55, (18) periodical payments shall be calculated to commence as of the date upon which the worker first became disabled from earning full wages at the work at which he was employed.
3. Where compensation is being awarded under Section 7 in respect of a loss of earnings or impairment of earning capacity, then, subject to Section 55, periodical payments of compensation shall be calculated to commence as of the date when the worker first suffered such loss of earnings or impairment of earning capacity, or as of the date when Section 7 came into force in respect of that claim, whichever is the later.
4. Where compensation is being awarded under Section 7 but not in respect of any loss of earnings or impairment of earning capacity, then, subject to Section 55, periodical payments of compensation shall be calculated to commence as of the date when the Board first receives a claim or other document indicating that the worker is claiming compensation for loss of hearing, or as of the date when Section 7 comes into force in respect of that claim, whichever is the later.
5. These regulations come into effect on the 1st of September, 1975, for total hearing loss. For partial hearing loss, the effective date is December 1, 1975 (B.C. Reg. 761/75).

#30.29 Assessment of Pensions for Traumatic Hearing Loss under Section 5(1)

Disabilities arising from traumatic hearing loss covered by Section 5 of the Act are assessed in accordance with the Permanent Disability Evaluation Schedule, Items 91 to 103.

To determine the percentage of disability in a case of bilateral hearing loss, a calculation is first made of the average hearing threshold in the three frequencies of the speech range, i.e. 500 cps., 1,000 cps., and 2,000 cps. A deduction is then made of 0.5 decibels for each year the claimant's age exceeds 50 to allow for presbycusis. This is done for each ear.

The net decibel loss in each ear is then translated into a percentage of disability by taking the nearest figure in the schedule. For example, if the net loss is 48 decibels, the percentage for 50 decibels is taken, i.e. 1.3%. An enhancement factor is also applied. This involves adding to the percentage of disability which the schedule allots to the poorer ear nine times the percentage it allots to the better ear. (19)

#31.00 PSYCHOLOGICAL/EMOTIONAL CONDITIONS

The Board does accept claims for personal injury where the injury consists of a psychological condition or the psychological condition is a consequence of a physical injury. (20) However, the Board has not recognized any psychological or emotional conditions as industrial diseases related to employment.

#31.10 **Alcoholism**

The Board has concluded that alcoholism should not be recognized as an industrial disease.

The correct way of determining whether alcoholism is a disease for the purpose of the *Workers' Compensation Act* is by comparing it with the other conditions already recognized as industrial diseases. If this is done, some differences are noticeable between alcoholism and other recognized diseases. These are:

1. In the case of all other diseases recognized under the Act, the condition compensated for is the harm resulting from the exposure to some sort of contaminant found in the course of a person's employment or the engaging in some sort of activity required by the employment. In the case of alcohol, harm does result from its consumption which might be characterized as a disease, but since the consumption itself is not normally part of a person's employment, that harm cannot be the "disease" for the purposes of the Act. To obtain coverage under the Act, the propensity of the worker to consume alcohol, separate and apart from the harm it causes, would have to be regarded as a "disease". However, that propensity does involve a voluntary act upon the part of the worker. Furthermore, there is no clear evidence that alcoholics have any particular physical or psychological abnormality which separates them from non-alcoholics and which could be regarded as a disease.
2. One cannot reproduce the condition of alcoholism consistently by the use of alcohol or other agents.
3. Alcoholism appears under such varied conditions and with such different manifestations that it is difficult to define its characteristics.

Therefore, it has been decided that alcoholism will not be recognized as an industrial disease for the purpose of the *Workers' Compensation Act*.

While there does not have to be evidence relating a disease to a particular employment before it is recognized as an industrial disease, there must be evidence that it is caused by some employment. There must be more than a speculative possibility. Furthermore, where the condition is one which affects the general population, it is not sufficient to show that work is just one of many factors in the person's life which might have contributed to his condition. The evidence must show that the work was of particular significance in bringing on the condition and that, if the worker had not engaged in that line of work, the condition would probably not have occurred.

There is normally no direct link between the consumption of alcohol and a person's employment. The drinking which results in alcoholism will usually take place outside of work hours or, if it takes place while at work, will not usually be regarded as part of the employment. If the employment is a cause, it must be an indirect one in the sense of producing the physical or mental state in the worker which induces him to drink.

A survey of relative [sic] literature indicated that many factors may be operative in causing alcoholism. While employment is one of the suggested factors, the evidence does not clearly support a conclusion that it does have causative significance or that, if it does, it has particular significance over and above the others. It appears rather as just one factor, along with the alcoholic's individual physiology and psychology, his family, social and cultural surroundings and his own personal failure to control his drinking. For a condition such as alcoholism, which is commonly found among the general population, this is not sufficient for it to be recognized as an industrial disease.

#31.20 **Physical and Emotional Exhaustion**

Physical and emotional exhaustion is not recognized by the Board as an industrial disease. In a claim made for compensation for a state of physical and emotional exhaustion alleged to have been caused by the stress of work, the Commissioners concluded that there was insufficient evidence that employment, as opposed to other factors in the claimant's life, were of causative significance in producing this condition.

#32.00 **FEDERAL GOVERNMENT EMPLOYEES**

The rights of employees of the Federal Government to compensation for industrial disease are set out in Section 3(1) of the *Government Employees' Compensation Act*. This provides that an "employee who... is disabled by reason of an industrial disease due to the nature of his employment, and...the dependants of any employee whose death results from such...industrial disease, are notwithstanding the nature or class of such employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed." Section 3(2) of this act applies a similar provision to railway employees of the Federal Government.

The meaning of "employees" was discussed in #10.72. The place where an employee is usually employed was discussed in #24.00.

#32.10 **Meaning of "Industrial Disease" under Government Employees' Compensation Act**

"Industrial disease" is defined in Section 2(1) to mean "any disease in respect of which compensation is payable under the law of the province where the employee is usually employed respecting compensation to workmen and the dependants of deceased workmen."

An employee who is disabled by reason of a disease that is not an industrial disease but is due to the nature of his employment and peculiar to or characteristic of the particular process, trade or occupation in which he is employed at the time the disease was contracted and the dependants of a deceased employee whose death is caused by reason of such a disease, are entitled to receive compensation at the same rate as they would be entitled to receive under the *Government Employees' Compensation Act* if the disease were an industrial disease, and the right to and the amount of such compensation is determined by the same board, officers or authorities and in the same manner as if the disease were an industrial disease. (21)

NOTES

1. See #25.40
2. See #93.21
3. See Chapter IX
4. See #25.10
5. See #25.21
6. S.7(1)(b), prior to amendment by S.5, *Workmen's Compensation Amendment Act*, 1974
7. S.7(3), prior to repeal by S.6, *Workmen's Compensation Amendment Act*, 1974
8. See #25.22
9. See #25.22
10. See #13.00
11. S.6(8)
12. S.6(7)
13. S.1
14. S.7(9)(d), prior to amendment by S.7, *Workmen's Compensation Amendment Act*, 1974
15. S.6(10)
16. See Chapter VI
17. See #93.24
18. See #93.21
19. See Chapter VI
20. See #13.20; #22.33-34
21. *Government Employees' Compensation Regulations*, Reg.2; *Government Employees' Compensation Act*, S.7(a)

APPENDIX G

CONSTITUTIONAL ISSUES WITH INDEPENDENT APPEAL TRIBUNALS

I. INTRODUCTION

The Ontario model of an independent Appeal Tribunal produces a tribunal which is the final level of appeal within the workers' compensation system, contrasted to the British Columbia model (for example) where the independent Appeal Tribunal is merely the intermediate level. In recommending the Ontario model, Paul Weiler cogently explained the reasons why such a tribunal should be the final level of appeal.

> [J]udgments about the merits of a concrete appeal made by a high-profile Appeal Tribunal must be considered final to all intents and purposes, whether in the eyes of the Workers' Compensation Board, the courts, or the Ombudsman. Under British Columbia legislation, there remain several routes by which the Workers' Compensation Board may, as a matter of course, review and reverse decisions of the External Board of Review (whether these decisions have reaffirmed or altered the first WCB adjudication). This strikes me as inconsistent with the rationale for an independent forum for compensation appeals, and would detract from the degree of authority which would be necessary to attract senior figures from the active ranks of business and labour in this province to serve on the Appeal Tribunal. It would also be a misuse of time of the top officials of the Workers' Compensation Board itself. To the extent that the focus of an appeal turns on the features of the immediate case, we would have to be willing to accept the verdict of the Appeal Tribunal as final.[1]

However, if such finality is taken and applied literally, the seemingly unpalatable fact must be faced that the Tribunal, in interpreting legislation and regulations, could thereby become the *de facto* policy maker in the system. It is certainly conceivable that a Tribunal could interpret a section of the Act in such a way as to invalidate long-standing Board policy on the point in question.

Weiler's proposed solution represents a modification of the finality aspect of Tribunal decisions:

> Suppose it is claimed that the judgment of the appeal panel in a single case rested on a stated general principle which is incompatible with the interpretation of the statute or the established policies of the Board, which has to deal with hundreds, even thousands, of such cases every year. Who should have the final say? I believe it should be the Workers' Compensation Board. The Corporate Board of the WCB should have the discretion to call such a case up for further scrutiny. (However, there should be no right of an individual party to push its case to this ultimate stage of review.) The Board would then canvass the issues, not simply with the immediate parties involved in the claim, but also with other organizations, such as the OFL or the CMA. Once it thought the matter through to its satisfaction, the Board would issue a general policy statement with supporting publishable reasons, which would govern both this appeal and similar cases in the future. I envisage that such action would be taken no more than a dozen times a year, in cases of serious importance to the overall system which would be ripe for Board resolution. If there still remained a dispute about who was right, the Workers' Compensation Board or the Workers Compensation Appeal Tribunal, the government of the province would have the matter thoroughly aired and squarely presented to it for legislative resolution.[2]

When these two concerns are read in close conjunction, one cannot help but have a sense of foreboding. The Tribunal is independent of Board control—or is it? The Tribunal's decision is final—or is it? Is Weiler trying to reconcile an inherent contradiction?

However, when it comes to passing legislation, there is no requirement that logic govern. The Ontario government created an independent appeal tribunal and provided, in s. 86g(3) of *The Workers Compensation Act*[3] that its decision is "final and conclusive." (Attached as Schedule A to this paper is the relevant sections of the Ontario Act.) The same section contains the usual, even if ineffective, privative clause against curial judicial review.

> s. 86g(3) The Appeals Tribunal may make any order or direction that may be made by the Board and the order or direction of the Appeals Tribunal or a panel thereof is final and conclusive and not open to question or review in any court upon any grounds and no proceedings by or before the Appeals Tribunal or a panel thereof shall be restrained by injunction, prohibition or other process or proceeding in any

> court or be removable by application for judicial review, or otherwise, into any court.

Having made the Tribunal independent of Board control, the Act then goes on in s.86n to blur the boundaries of decision-making jurisdiction by granting to the Board "a very significant power to interfere with decisions of the Tribunal".[4]

> s.86n Determination of issues by Board. (1) Where a decision of the Appeals Tribunal turns upon an interpretation of the policy and general law of this Act, the board of directors of the Board may in its discretion review and determine the issue of interpretation of the policy and general law of this Act and may direct the Appeals Tribunal to reconsider the matter in light of the determination of the board of directors.
>
> (2) Where the board of directors of the Board in the exercise of its discretion under subsection (1) considers that a review is warranted, it shall either hold a hearing and afford the parties likely to be affected by its determination an opportunity to make oral and written submissions or it may dispense with a hearing if it permits the parties likely to be affected by its determination to make written submissions, as the board may direct.
>
> (3) The board of directors of the Board shall give its determination and direction, if any, under this section in writing together with its reasons therfor[sic].
>
> (4) Pending its determination, the board of directors of the Board, with respect to the decision that is the subject-matter of the review, may stay the enforcement or execution of the order made under the decision or may vacate the order if it has been implemented.

Note that the Board's power to review, although limited in scope, is exercised "in its discretion"—so that the Board "will presumably be able to intervene on its own motion, as well as on the request of one of the parties to the case under appeal."[5] While it prevents any party from demanding this review as of right (thus preserving the finality of the Tribunal's decision so far as the parties may control), it allows the Board to review on its own initiative and at its own behest. (More will be made of this point later.)

If a review is held, s.86n(2) and (3) governs its procedure. Note that what the Board determines is **not** the merits of the case, but only the correct interpretation of policy and law. Although s.86n(3) speaks of the Board's "determination and direction, if any," it is submitted that "direction" does not mean that the Board is empowered to direct a certain result on the merits of the case (for example, a direction to the Tribunal to reverse its decision). The meaning of "direction" is seen in s.86n(1)—the Board "may direct the Appeals Tribunal **to reconsider the matter** in light of" the Board's determination of the meaning of policy.

Thus plainly, the Board is given no jurisdiction to deal directly with the merits. It cannot direct the Tribunal to "do" anything except reconsider. It is fully conceivable that the Tribunal could reconsider but reach the same substantive decision on the merits of the case.

The Board's jurisdiction, then, is to interfere if it wishes in the **interpretation** of policy, not in the **application** of policy otherwise correctly interpreted. One wonders, in practice, whether such a fine distinction could be maintained.

More to our current point, however, would it be correct to characterize the Board's jurisdiction as "appellate" (even if limited)? It is arguably not so, because of the Board's inability to substitute or otherwise dictate its own decision on the merits. It is submitted that the Board's jurisdiction is more closely analagous to, and should perhaps be characterized as, "review power" or "supervisory jurisdiction."

Turning to s.86n(4), note that, while the Board's determination of the interpretation of policy/law is pending, it is empowered to stay or suspend the Tribunal's order, or may "vacate" (i.e. quash) it. This is a temporary measure and does not mean the same thing as the Board being empowered to substitute its own decision/order on the merits of the case.

II. STATEMENT OF THE CONSTITUTIONAL ISSUES

A. BRIEF OVERVIEW OF SECTION 96

Although, as previously stated, there is no requirement that logic govern the passage of legislation, the Ontario model's inherent contradiction may fall afoul of the constitutional division of powers.

The basis for a constitutional challenge in this case would be section 96 of *The Constitution Act, 1867*, which provides:

> s.96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

For our purposes, this may be summarized as: "only the federal government can appoint Judges of Superior Courts."

This seemingly innocuous provision, if taken literally, could he easily evaded by a province wishing to avoid federal government interference in appointment of judges. The province would simply have to create an inferior court or tribunal, give it all the powers of a superior court, and then appoint its own judges to it. It is precisely to head off this ease of evasion that:

> courts have added a gloss to s.96.... What they have said is this: if a province invests a tribunal with jurisdiction of a kind which ought properly to belong to a superior... court, then that tribunal, whatever its official name, is for constitutional purposes a superior... court and must satisfy the requirements of s.96.... This means that such a tribunal will be invalidly constituted, unless its members... are appointed by the federal government in conformity with s.96....[6]

So when dealing with a s.96 problem, the basic issue is always whether some power or function of the inferior court or provincial tribunal is, in fact or by analogy, a power or function of a superior court. If it is, the section of the provincial statute granting such power to the tribunal will be struck down as unconstitutional; in some cases, the tribunal as a whole will be struck down.

> So far the law is clear, and the policy underlying it is comprehensible. But the difficulty lies in the definition of those functions which ought properly to belong to a superior, district or county court. The courts have attempted to fashion a judicially enforceable rule which would separate "s.96 functions" from other adjudicatory functions. The attempt has not been successful, and it is difficult to predict with confidence how the courts will characterize particular adjudicatory functions.... For the most part, the courts have exercised restraint in reviewing the provincial statutes which create new adjudicatory jurisdictions, so that the difficulty has not been as serious as it could have been. However, in the last decade, there has been a regrettable resurgence of s.96 litigation.[7]

The judicial restraint referred to occurred in the early years of the creation of Canada's welfare state. As administrative boards and tribunals proliferated, it was obvious that beneficial social policies and regulation could not be provided by the provinces unless the courts took a very lenient view of s.96 and the test to be applied in finding whether a particular function should be characterized as a superior court function. So, for example, Workers Compensation Boards were very early on held to be constitutional.[8]

However, in the recent "regrettable resurgence of s.96 litigation," the Supreme Court of Canada has laid down much tighter guidelines and made it clear that s.96 must still be taken very seriously as a restraint on provincial power.

B. BASES OF S.96 CHALLENGE TO THE ONTARIO MODEL

There are four ways to use s.96 to challenge the constitutionality of the Ontario model of an independent appeal tribunal system:

1) by arguing that the Board's power to stay or quash the Tribunal's order represents the unconstitutional appropriation of a superior court power;
2) by arguing that the Board's power to review the Tribunal's interpretation of law/policy is not mere appellate jurisdiction but is, rather, supervisory jurisdiction which properly belongs only to a superior court;
3) by arguing that the Board's power to review is in fact the power to issue declaratory judgments, a power which belongs only to superior courts;
4) if the Board's power to review is indeed of an appellate nature, by arguing on the basis of recent caselaw that it or even the Tribunal itself may violate s. 96 because of the combination of an appeal on law alone and the protection of a privative clause.

Each of these arguments will be considered in turn. First, however, it may be of use to describe the multi-tiered test which the Supreme Court of Canada has devised to determine whether an impugned function of an inferior court or tribunal is analagous to a Superior Court function and hence in violation of s.96.

C. THE TEST FOR VIOLATION OF S. 96

In *Reference re Residential Tenancies Act*,[9] Mr. Justice Dickson (as he then was) laid down a three-step test for the determination of this question, as follows:

STEP 1: HISTORICAL INQUIRY. Does the provincial board's impugned power **broadly conform** to a power exercised by a superior court at the time of Confederation in 1867?

IF NOT, then the power does not violate s.96 and the constitutional challenge is at an end.

IF IT DOES, then Step 2 must be considered.

STEP 2: IS IT A "JUDICIAL" POWER? The impugned power must be characterized as either "judicial", "administrative", or "legislative."[10]

IF IT IS ADMINISTRATIVE OR LEGISLATIVE, then the power does not violate s.96 and the constitutional challenge will be ended here.

IF IT IS JUDICIAL, then Step 3 must be considered. Mr. Justice Dickson suggested that a "judicial power" involves all the following three criteria:

(a) the tribunal is faced with a private dispute between parties;

(b) such dispute must be adjudicated through the application of a recognized body of rules; and

(c) it must be adjudicated in a manner consistent with fairness and impartiality.[11]

[As I'm sure you have already noticed, it may be criterion (a)—the "private dispute"—which may prove the most fruitful loophole for workers' compensation cases: more on this possibility later.]

STEP 3: THE "INSTITUTIONAL SETTING" INQUIRY. Even if the power is a judicial power historically exercised by superior courts, the Court, in considering constitutional status will not detach it from its setting in the institutional arrangements in which it appears — i.e. the power will not be viewed in isolation from, but rather in conjunction with, other purposes, functions and powers of the board.

"It may be", stated Mr. Justice Dickson,

> that the impugned 'judicial powers' are merely subsidiary or ancillary to general administrative functions assigned to the tribunal ... or the powers may be necessarily incidental to the achievement of a broader social policy goal of the Legislature.... In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a **sole or central function** of the tribunal ... so that the tribunal can be said to be operating 'like a s.96 court'.[12]

Such is the liberal nature of this aspect of the test that many adjudicative functions vested in administrative tribunals have been sustained by their being "ancillary to a broader administrative and policy-making role as administrator of ... [remedial] legislation."[13]

While the three-step test of constitutionality may be praiseworthy as a "sound synthesis of the prior caselaw,"[14] the vagueness and disputability of each step in the process makes it unsatisfactory as a constitutional law doctrine, asserts Hogg.[15]

Be that as it may, the three-step test will be in the forefront as we now turn (finally) to a consideration of the four potential s.96 challenges to the Ontario model.

III. THE POWER TO STAY

The power to stay, suspend or quash the decision of **another body** is traditionally the feature of a court exercising appellate or supervisory review power over that other body. Given our court structure, it is a power thereby found only in superior courts which occupy the "second level" or higher in the structure.

There is apparently no caselaw which has considered the constitutionality of such a power being granted to any administrative tribunal. However, since the power to stay is essentially in its nature the power to forbid temporarily the carrying out of an order, one might say that it is a power analagous to (although certainly not identical with) the power to issue injunctions. Therefore, by analogy, two cases decided by the Supreme Court of Canada may be helpful.

In *Tomko v. Labour Relations Board (Nova Scotia)*,[16] the Labour Relations Board was empowered to issue "cease and desist" orders against unions or employers in the context of labour disputes. It was contended that this power was equivalent to the traditional superior court power to issue injunctions.

The Supreme Court rejected this equivalency argument. It pointed to what it found to be significant differences surrounding the exercise of the "cease and desist" power: the legislative scheme makes allowances for efforts at settlement of the labour dispute before or after the issuance of the cease and desist order; the Board makes its own investigation of the issues prior to issuing the order; once the Board determines that an unlawful work stoppage has occurred, the cease and desist order must issue without any consideration for the "balance of convenience" as between the parties to the labour dispute; finally, the Board is involved in continuous supervision of the situation.[17] The court basically found that the cease and desist power did not "broadly conform" to a superior court's power to grant injunctions, and on this basis alone the power could be held to be constitutional. Many commentators (probably quite rightly) found the reasoning here to be more concerned with form than with what is surely more important, namely, substance.

It is also in the *Tomko* case that the court first made mention of the "institutional setting" approach which ultimately became the third step in Mr. Justice Dickson's formulation of the "s.96 test." The cease and desist power was found to be a necessary incident to the broader social function, purpose and empowerment of the Board to deal with industrial disputes. Thus, the power was on this basis as well held not to be unconstitutional.

In *Reference Re Section 6 of the Family Relations Act*,[18] inferior courts had been vested by a province with the jurisdiction to make orders dealing with guardianship and custody of children, occupancy of the family home, and rights of spousal entry onto property, ("prohibition" orders). The Supreme Court found the last two powers to be unconstitutional, because in being able to bar or forbid a property owner's entry onto or occupancy of his/her own land, the inferior courts were in fact dealing with proprietary interests, which may only be removed or impeded by a superior court.

The argument was, however, tried that the inferior courts were not really dealing with proprietary interests but were merely giving "injunctive relief" in the same way as had been permitted in the *Tomko* case. The Supreme Court denied there was a parallel, stating:

> "The cease and desist orders there [in *Tomko*] were adjuncts of a valid administrative scheme dealing **in its central features** with matters that **had not been cognizable, certainly not in their institutional setting, by any Court**."[19]

In light of these cases, what factors may be used when considering the Workers Compensation Board's power to stay?

It could be argued that the power to stay does not "broadly conform" to the equivalent superior courts power because of the following differences:

- — a Court stays another body's order only upon application from a party, not upon its own initiative;
- — when a court stays an order, the stay is, in and of itself, appealable. This is not the case in the Ontario model.
- — when applying for a stay before a court, it must be shown that the stay will not prejudice, either unduly or relatively speaking, the party against whom it operates. There is no indication that the Board need consider such criteria.
- — the biggest difference [it seems to me] is that the Board itself is in fact "interested" (in the legal sense) in whether a stay occurs or not, because the Board administers the money which may have to be recovered from the worker if an award is not stayed but is eventually overturned by the Tribunal's reconsideration.

We have seen in *Tomko* that form can triumph over substance, but even if the power to stay is "broadly conformable," there is an argument to be made at Step 2 of the test that the Board's power to stay is not a judicial power because there is no dispute between parties.

A logical difficulty arises here. In the setting of judicial review for breaches of procedural natural justice, Workers Compensation Boards are generally found to be exercising quasi-judicial powers, else the courts would not exercise supervisory jurisdiction over them (especially in the days when the availability of judicial review depended precisely on the existence of such quasi-judicial powers). Even if, strictly speaking, there is no action **between parties** per se, the Board must still adjudicate upon rights and entitlements that carry significant consequences for the one "party" involved—the claimant-worker. Thus, the Board may properly be said to be exercising quasi-judicial power.

But if Mr. Justice Dickson's reference to a private dispute between parties is taken too literally, then s.96 challenges to Workers Compensation Boards would always, of necessity, have to fail.

Hogg, in discussing Step 2 of the s.96 test, cites a certain Supreme Court of Canada case as an example where an impugned power failed Step 2, and thus was upheld as constitutional, precisely because of the absence of a private dispute between parties.[20] The case, *Massey-Ferguson Industries Limited* v. *The Government of Saskatchewan*,[21] concerns a board administering a compensation scheme funded by assessments on farm machinery distributors. Farmers aggrieved by delays in machinery repair could apply to the Board for compensation for their losses. The Board operated much like a Workers Compensation Board in investigating the claim, establishing entitlement and determining amount of compensation. It was argued that the functions of the Board violated s.96.

The Supreme Court of Canada, however, did not do precisely what Hogg says it did. The Court certainly took note of the fact that there was no private dispute between parties, but it did not use this fact to find that the Board therefore did not exercise judicial powers. The Court made no binding statement about Step 2 of the test; it explicitly assumes that "there is a judicial component in the manner in which the power is exercised: (at least in respect of required notice and hearing and in determining entitlement to compensation)".[22]

It was in considering Step 3 of the s.96 test that the Court placed significance on the lack of a private dispute between parties:

> [T]he Board's functions in the **institutional setting** in which it operates distinguish it markedly from a s.96 court. There is no limitation to legal considerations in fixing compensation, although they may be present in some cases; **there is no lis inter partes in the traditional sense in which one exists in an action**, and the Board has a clear investigatory function, independently of what may be brought before it by others, unlike the neutral process of a court. The Board's authority is integrated into a regulatory scheme, itself beyond constitutional challenge, and under it offers limited protection to farmers through what is essentially an insurance fund.[23]

The *Massey-Ferguson* case, therefore, would seem to dissipate, not bolster, some of the strength of a "Step 2" argument in a workers' compensation setting. It is submitted that the Board's power to stay would likely be found by a court to be a quasi-judicial power, as is consonant with common sense.

I believe the strongest arguments to be made in favour of the constitutionality of the Board's power to stay can be made in the context of Step 3 of the test. As the *Massey-Ferguson* quotation clearly states, the institutional setting of a compensation board is primarily that of administering a regulatory scheme.

The regulatory scheme of workers' compensation is itself an exercise of valid provincial constitutional capacity and objects. Hearkening back to the quotation cited from the Supreme Court's judgment in *Reference Re Section 6 of the Family Relations Act*, the central features of the administrative scheme deal with matters which are not cognizable in their institutional setting by any court. The fact that the Board administers a no-fault system only heightens the strength of this fact.

Looking at the broader context of the institutional setting, the Board's power to stay does seem pretty subsidiary or ancillary to its main functions. Certainly it could not be described as "a sole or central function of the Tribunal." This being the case, it is submitted that a court would more likely than not find the power to stay, in and of itself, constitutional.

IV. POWER TO REVIEW AS SUPERVISORY JURISDICTION

The viability of this argument against the constitutionality of the Board's residual power to control the interpretation of law/policy depends on the nature of the review power vested in the Board.

As stated in the introduction, there is an argument to be made that its review power is more "broadly analagous" to the supervisory review power of a superior court than to strict appellate jurisdiction per se. Factors supporting such an argument are:

— the inability of the Board to substitute its own decision **on the merits** of the case, instead of which it may only direct the Tribunal to reconsider;

— the fact that no formal appeal route mechanism is laid down in the statute; on the contrary, the Board itself may initiate review but cannot be resorted to as of right;

— the power to review solely the Tribunal's interpretation of law has superficial similarities to a superior court's ability to issue prerogative relief against an inferior body which has committed, in the parlance of administrative law, an "error of law on the face of the record." Such supervisory review is sought from a superior court when the inferior Tribunal has, for example, blatantly misinterpreted the meaning of the statute which it administers. This is not a jurisdictional error, as is a breach of Natural Justice. The Tribunal is acting within its jurisdiction, but in a patently wrong or absurd manner. "Error of law on the face of the record" is rarely resorted to these days, because it is the only ground for review which courts concede can be effectively protected by a privative clause. So, for example, in our *Workers Compensation Act*, the privative clause in s.51(1) is ineffective to block review for jurisdictional error (which accounts for the vast bulk of review applications in any event) but does block the rarer review for error on the face of the record.[24]

So it could be argued that the privative clause blocks the superior court jurisdiction which is then vested in the inferior Board instead.

- In s.86g(3) of the Ontario Act, as has been noted, the decision of the Tribunal is stated to be "final and conclusive." In the British case of *Ex parte Gilmour* [25] which concerned workers' compensation legislation, the statute stated that the Board's decision was "final." The British Court of Appeal said that "final" means only that there **can be no appeal**; the decision is final only on the facts, not on the law. **Prerogative review** could still be sought. Using this reasoning, it is arguable that the Board's review power is also in the nature of supervisory review and is not, strictly speaking, an appeal.

Assuming a court would buy this view of the nature of the Board's review power, it is submitted that no court would justify the existence in an inferior body of such supervisory power under the "Step 3" test of institutional setting, simply because of the extreme jealousy of superior courts in preserving their unique ability to exercise supervisory review themselves.

V. POWER TO REVIEW AS DECLARATORY JURISDICTION

The viability of this argument as well depends on how the Board's review power is classified.

Because the Board's review power is explicitly limited to determining the **interpretation** of law/policy but it is still the Tribunal which must "reconsider" the merits (i.e. **apply** the interpretation), it is arguable that what the Board has been granted is neither supervisory power, nor appellate power, but declaratory power—the power, in essence, to issue binding statements of the meaning of laws. Declaratory power is an exclusive feature of superior courts.

In the case of *Re Jost and Manitoba Hydro*,[26] the Labour Board issued a certificate describing those employees included in a certain bargaining unit. In a subsequent dispute before it, the Board stated that the certificate should be interpreted as including other employees as well. It was not a situation where the Board was formally amending a prior certificate; it was a case of interpretation leading to a de facto difference in meaning.

The Manitoba Court of Appeal found that the statute did not expressly confer declaratory power upon the Board. This ended the matter, but the Court went on to comment, in **obiter dicta**, about the constitutionality of such a grant were it to be made:

> Judgments which purport to declare the law and the meaning of statutes and other written instruments are fraught with difficulty and sometimes unlooked for dangers....
>
> Under the exising law in Manitoba and elsewhere in Canada the use of declaratory judgments is bounded by caution. Declarations are never made "in the air". It is only declarations of rights that are sometimes made and then only after hearing all interested parties.
>
> I agree with the learned Chambers Judge that the authority to make declaratory judgments can only be created by clear-cut language. Furthermore, I seriously doubt that it is within the power of the provincial Legislature to confer on a tribunal the power to make simple declarations. Under s.96 of the *British North America Act, 1867*, Superior Court Judges must be appointed by the federal Government from among members of the Bar. Provinces cannot create provincial tribunals which exercise the powers of Superior Court Judges and yet retain the appointment of the tribunals in the provincial Government.[27]

Again, the considerations and arguments to be made at Step 3 of the s.96 test, which have already been outlined, could be made to perhaps save the grant of power to the Board.

VI. POWER TO REVIEW AS APPELLATE JURISDICTION

If the power of the Board to review interpretation of law/policy is more properly understood as appellate juridiction limited to questions of law, is there a Section 96 problem? If not, could there be a s.96 problem with the independent appeal tribunal itself?

Recent cases concerning administrative structures and privative clauses have introduced a grey area of uncertainty in this field.

In *A.-G. Que.* v. *Farrah*,[28] a Transport Tribunal was established with final and exclusive jurisdiction to decide primarily questions of law on appeals from the Transport Commission. The tribunal's appellate jurisdiction was protected by a privative clause. The Supreme Court of Canada found this to be a deadly combination. A majority of the judges clearly held that both factors were required for unconstitutionality, but the minority judgment of Laskin, C.J.C. seemed to suggest that conferring appellate authority restricted to law alone was enough to render the system unconstitutional.[29] A major factor appeared to be that the Tribunal's authority was purely appellate; it had no involvement in the exercise of original juridiction under the Act.[30]

In the Ontario model, this is not true of the Board—it has original jurisdiction (i.e. it's involved in administering the scheme as a whole and is the primary adjudicator). Nor is its appellate jurisdiction protected by a privative clause—the privative clause in s.86g(3) clearly applies only to decisions of the Tribunal.

The Board's position, then, appears to be safe from either approach: it is safe from the Laskin approach because of its original jurisdiction and it is safe from the majority approach because it is not combined with a privative clause. Nor is it dangerous that the privative clause doesn't cover it because the Ontario model is careful to place the ultimate "final decision" back in the hands of the Tribunal. Remember that it is a general principle that prerogative relief cannot be sought against a decision which is not the final decision in the process.

But is the Tribunal, in which both factors of appellate authority on questions of law and a privative clause combine, left open to a s.96 challenge? The system is different from the *Farrah* system because our Tribunal's appellate authority on questions of law is not final or exclusive—it is subject to the Board's review. On this basis, the unconstitutionality found in *Farrah* should not follow in the Ontario model.

It therefore appears (at least to me) that the Ontario model, whatever other policy reasons may have dictated its set-up, is a rather clever response to the dog's breakfast of a situation left in the wake of the *Farrah* case.

The situation gets more complicated though, when one considers a Supreme Court of Canada case decided after *Farrah: Crevier v. A.-G. (Que.).*[31] This is the case, discussed in my aforementioned Natural Justice paper, that held that a privative clause read literally will turn any tribunal thereby protected into a s.96 superior court which will be struck down.

This is a case which must be taken seriously. The dream of completely eliminating judicial review of administrative agencies which has been pursued by legislatures for so long must, it is submitted, be abandoned.

If an appeal structure is set up without a privative clause, *Crevier* poses no danger. But if the structure has appellate authority dealing with questions of law alone and that appellate authority exercises no original jurisdiction, the Laskin view in *Farrah* could threaten it even so, at least in theory.

So it is submitted, the Ontario model is not quite as foolproof in the light of *Crevier* as it used to be in the light of *Farrah* alone.

What should be done? My personal opinion is that it would be better just to omit the privative clause and take the risk of the Laskin view, since I do not believe it will ultimately prevail. However, if the legislature is unwilling to omit the superficial security blanket of a privative clause it would be better to use the wording of the one already in use since it has been judicially interpreted as not excluding judicial review for lack of jurisdiction.

If a privative clause is retained, it would be a mistake, it is submitted, to attempt to draft the ultimate ironclad clause. In the first place, mere words will never exclude judicial review if the judiciary does not want them to, and in the second place, it might prompt a court to take it literally at its face value. This would not produce the desired effect of excluding judicial review, but would cause the court to strike down the appeal system as a s.96 court.

VII. ALTERNATIVE FORMATS?

Is there a way of creating a truly independent appeal tribunal without making it into a de facto policy maker? In other words, how can the Board retain final control over interpretation of law/policy?

The B.C. model does not achieve both goals. Because the independent tribunal is only at the intermediate level, the value of its independence is dissipated by returning full appellate control to the Board at the final level. But the Board does thereby control policy interpretation.

The Quebec model has a truly independent appeal structure but the commission retains no residual power to interpret law/policy. So it does not meet both goals either.

The Alberta model has no independent appeal tribunal per se but aggrieved claimants, after having gone through the internal appeal system, can go on to the ombudsman. The provincial cabinet can then get involved:

> s.22. **Intervention by Lieutenant Governor in Council.** Notwithstanding anything in this Act, if, after considering the report

> and recommendations of the Ombudsman, the Lieutenant Governor in Council is of the opinion that an injustice or hardship to a worker has resulted or will result, the Lieutenant Governor in Council may direct the Board
>
> (a) to pay to the worker from the Accident Fund an amount that the Lieutenant Governor in Council considers appropriate,
>
> or
>
> (b) to refer the matter to the Court of Queen's Bench for an assessment of damages and to pay to the worker from the Accident Fund the amount of any damages so assessed.[32]

It is submitted that this model is not particularly satisfactory for the following reasons:

- it retains a purely internal appeal system which will handle and be the only outlet for the vast bulk of cases;
- resort to the ombudsman and provincial cabinet is probably a slow and discouraging process, rendered slower (no doubt) if the matter is then referred to the Queen's Bench;
- there would appear to be no way to ensure consistency of decisions over time.

The Nova Scotia model does not solve both problems either since the final level of the independent appeal process is (by leave) the courts. The court has the last say on interpretation, since that is a question of law. The Nova Scotia Act is quite uniquely detailed about procedure; a copy of the relevant sections is attached as Schedule B. Note that no privative clause is required.

No other province has an independent appeal structure.

VIII. CONCLUSION

The Ontario model does seem to offer the best resolution of the contradictory desire to establish an independent appeal structure without having the Board relinquish final control over interpretative issues.

As to constitutional problems, the power to stay may survive a s.96 challenge. The safest thing to do would be to omit it. No other province having an independent appeal structure seems to feel the need to have such a provision. In fact, the Quebec Act expressly provides that an application for a review or appeal does not suspend payment of an indemnity paid in the form of a pension: s.65.1. The B.C. Act goes even further:

> s.92. **Appeal not a stay**. Where a claim is allowed following a finding by the review board, periodic payments under the finding shall commence notwithstanding that an appeal is taken under section 91, and a lump sum under section 17(13) shall be paid; and an amount so paid is not, in the absence of fraud or misrepresentation, recoverable from the worker or dependants.

The Ontario model deals with the *Farrah* and *Crevier* aftermath in a reasonable way, although the continued value of a privative clause must now be weighed against the potential danger it may pose.

FOOTNOTES

1. Paul C. Weiler, *Reshaping Workers Compensation for Ontario* (Toronto: Ministry of Government Publications, 1980), p. 115. [emphasis in original]
2. *Id.*, p. 116.
3. R.S.O. 1980, c. 539, as am.
4. A. W. Farquhar, "Appeals and Judicial Review of Workers Compensation Board Decisions" in The Law Society of Upper Canada, Continuing Legal Education Program, *The Workers Compensation Act, 1985 (Bill 101)* (Toronto: Osgoode Hall, 1985), p. C-3.
5. *Ibid.*
6. Peter W. Hogg, *Constitutional Law of Canada* (2nd ed.) (Toronto: The Carswell Company Limited, 1985), p. 151.
7. *Id.*, pp. 151—152.
8. *Tremblay* v. *Kowhanko*, [1920] 1 W.W.R. 787 (Man. C.A.); *A.-G. Que.* v. *Slanec and Grimstead* (1933), 54 Que. K.B. 230 (Que. C.A.).
9. (1981), 123 D.L.R. (3d) 554 (S.C.C.).
10. The classification of statutory powers was discussed in the paper "The Legal Concept of Natural Justice" which I wrote for you in March, 1986, although the general nature of that discussion may not be of great use here.
11. *Supra*, n. 9, pp. 571—572; *see also*: *Supra*, n. 6, p. 159.
12. *Supra*, n. 9, p. 572. [emphasis added]
13. *Supra*, n. 6, p. 159.
14. *Id.*, p. 161.
15. *Ibid.*
16. (1975), 69 D.L.R. (3d) 250 (S.C.C.).
17. *Id.*, p. 257.
18. (1982), 131 D.L.R. (3d) 257 (S.C.C.).
19. *Id.*, p. 279. [emphasis added]
20. *Supra*, n. 6, p. 159.
21. [1981] 2 S.C.R. 413.
22. *Id.*, p. 429.
23. *Ibid.* [emphasis added]
24. *C.N.R.* v. *Wilson*, [1918] 3 W.W.R. 730 (Man. C.A.); *In re The Workmen's Compensation Act*, [1950] 1 W.W.R. 673 (Man. C.A.).
25. [1957] 1 Q.B. 574 (Eng. C.A.).
26. (1975), 65 D.L.R. (3d) 495 (Man. C.A.).
27. Id., pp. 500—501.
28. [1978] 2 S.C.R. 638 (S.C.C.).
29. David J. Mullan, "The Uncertain Constitutional Position of Canada's Administrative Appeal Tribunals" (1982), 14 Ottawa L.R. 239, at p. 258.
30. *Supra*, n. 28, p. 646.
31. (1982), 127 D.L.R. (3d) 1 (S.C.C.).
32. *Workers Compensation Act*, S.A. 1981, c. W-16, as am.

Prepared for: Workers Compensation Act Legislative Review Committee

Prepared by: Debra Hathaway

Date: March, 1987

SCHEDULE A

ONTARIO WORKERS COMPENSATION ACT

86a. ***Appeals Tribunal established.*** There is hereby constituted a tribunal to be known as the "Workers' Compensation Appeal Tribunal." (S.O. 1984, c. 58, s.32)

86b. ***Composition of Appeals Tribunal.*** (1) The Lieutenant Governor in Council shall appoint a chairman of the Appeals Tribunal, one or more vice-chairmen of the Appeals Tribunal and as many members of the Appeals Tribunal, equal in number, representative of employers and workers, respectively, as is considered appropriate.

(2) The remuneration, benefits and allowances of the members of the Appeals Tribunal shall be determined by the Lieutenant Governor in Council.

(3) The chairman of the Appeals Tribunal, subject to such guidelines as may be established by the Management Board of Cabinet and subject to the provisions of the *Crown Employees Collective Bargaining Act,* may establish job classifications, personnel qualifications and ranges for remuneration and benefits for officers and employees of the appeals Tribunal, and the chairman may appoint, promote and employ the same in conformity with the classifications, qualifications and ranges for remuneration and benefits so established by the chairman.

(4) For the purposes of section 74 only, every full-time member of the Appeals Tribunal and every person appointed under subsection 3 to full-time employment shall be deemed to be an employee of the Board.

(5) The costs and expenses associated with the administration of the Appeals Tribunal, including remuneration and expenses of its members, officers and employees, shall form part of the administration expenses of the Board. (S.O. 1984, c. 58, s.32)

86c. ***Chairman.*** (1) The chairman of the Appeals Tribunal is its chief executive officer and shall preside at its meetings and upon all panels of the Appeals Tribunal of which the chairman is a member.

(2) In the absence from Ontario of the chairman, the chairman's inability to act or where the office is vacant, the chairman's duties shall be performed by a vice- chairman designated to act by the chairman or, where the chairman has failed so to designate, by a vice- chairman designated to act by the Minister of Labour.

(3) Whenever it appears that a vice-chairman has acted for and instead of the chairman, it shall be presumed that the vice-chairman has so acted in the absence or disability of the chairman or because of a vacancy in the office of the chairman.

86d. ***Quorum.*** (1) A quorum shall consist of the chairman of the Appeals Tribunal or a vice-chairman of the Appeals Tribunal designated by the chairman to act in place of the chairman and not less than two members of the Appeals Tribunal to be equal in number and representative of employers and workers.

(2) A quorum may exercise all the jurisdiction and powers of the Appeals Tribunal.

(3) The decision of the majority of the quorum present and constituting the Appeals Tribunal is the dicision thereof, but, if there is no majority vote, the decision of the chairman or the vice-chairman governs. (S.O. 1984, c. 58, s. 32)

86e. ***Panels.*** (1) The chairman of the Appeals Tribunal may establish panels of the Appeals Tribunal and a panel has all the jurisdiction and powers of the Appeals Tribunal.

(2) A panel of the Appeals Tribunal shall consist of three members as follows:

1. The chairman or a vice-chairman of the Appeals Tribunal.
2. One member of the Appeals Tribunal representative of employers.
3. One member of the Appeals Tribunal representative of workers.

(3) The decision of the majority of a panel consisting of three persons is the decision of the Appeals Tribunal. (S.O. 1984, c. 58, s. 32)

86f. ***Effect of resignation, expiry of term.*** Where the chairman, a vice-chairman or other member of the Appeals Tribunal resigns or the term of office expires, the person may carry out and complete any duties or responsibilities that the person would have had if the person had not resigned or the person's term had not expired in respect of any application, proceeding or matter in which the person participated. (S.O. 1984, c. 58, s. 32)

86g. ***Jurisdiction.*** (1) Subject to section 86n, the Appeals Tribunal has exclusive jurisdiction to hear, determine and dispose of.

(a) any matter or issue expressly conferred upon it by this Act;

(b) all appeals from decisions, orders or rulings of the Board respecting the provision of health care, vocational rehabilitation or entitlement to compensation or benefits under this Act; and

(c) all appeals respecting assessments, penalties or the transfer of costs,

and subsection 75 (2) applies with necessary modifications where a matter referred to in that subsection is raised in an appeal.

(2) The Appeals Tribunal shall not hear, determine or dispose of an appeal from a decision, order or ruling of the Board unless the procedures established by the Board for consideration of issues respecting the matters mentioned in clause (1)(b) or (c) have been exhausted, and the Board has made a final decision, order or ruling thereon.

(3) The Appeals Tribunal may make any order or direction that may be made by the Board and the order of direction of the Appeals Tribunal or a panel thereof is final and conclusive and not open to question or review in any court upon any grounds and no proceedings by or before the Appeals Tribunal or a panel thereof shall be restrained by injuction, prohibition or other process or proceeding in any court or be removable by application for judicial review, or otherwise, into any court. (S.O. 1984, c. 58, s. 32)

86h. ***Panel of medical practitioners.*** (1) The Lieutenant Governor in Council, after requesting and considering the views of representatives of employers, workers and physicians, shall appoint qualified medical practitioners, other than practitioners appointed under subsection 72 (1) or 86b (3), to a list and the Appeals Tribunal may obtain the assistance of one or more of them in such way and at such time or times as it thinks fit so as to better enable it to determine any matter of fact in question in any application, appeal or proceeding.

(2) The chairman of the Appeals Tribunal may fix the remuneration of a medical practitioner who provides assistance to the Appeals Tribunal under this section and the remuneration shall be part of the administrative expenses of the Board.

(3) A medical practitioner shall not be asked, except with the written consent of the parties of record, to assist the Appeals Tribunal in any application, appeal or proceeding where the practitioner,

(a) has examined the worker whose claim is the subject-matter of the application, appeal or proceeding:

(b) has treated the worker or a member of the family of the worker:

(c) has acted as a consultant in the treatment of the worker or as a consultant to the employer: or

(d) is a partner of a practitioner mentioned in clause (a), (b) or (c).

(4) The Appeals Tribunal has power to authorize the chairman or a vice-chairman to inquire into applications by way of appeal under clause 86g (1)(b) to determine whether an issue involves a decision of the Board upon a medical report or opinion and, if such is the case, the person making the inquiry may, before the appeal is heard by the Appeals Tribunal, require that the worker submit to an examination by one or more medical practitioners appointed under subsection (1) who shall report, in writing, to the Appeals Tribunal thereon.

(5) The appeals Tribunal shall, upon receiving the report of the medical practitioner, send a copy thereof to the parties to the appeal for the purpose of receiving their submissions thereon.

(6) Nothing in subsection (4) limits the right of the Appeals Tribunal to exercise its powers under subsection (1) during the hearing of an appeal.

(7) If a worker is required by the Appeals Tribunal to submit to an examination by one or more medical practitioners who provide assistance to the Appeals Tribunal under this section and the worker does not submit to the examination or in any way obstructs the examination, the worker's right to compensation or to a final decision by the Appeals Tribunal may be suspended by the Appeals Tribunal. (S.O. 1984, c. 58, s. 32)

86i. ***Application of s. 83.*** Section 83 applies with necessary modifications to the chairman, vice-chairman and other members of the Appeals Tribunal, to all officers and employees of the Appeals Tribunal and any person engaged by the Appeals Tribunal to conduct an examination, test or inquiry, or authorized to perform any function under this Act. (S.O. 1984, c. 58, s. 32)

86j. ***12 Notice.*** (1) Upon receipt of a notice of appeal, the Appeals Tribunal shall, as soon as practicable, notify the Board and the parties of record of the appeal and issues in respect of which the appeal is brought and shall furnish the same with copies of any written submissions made with respect thereto.

(2) Any periodic payments to be paid under a decision of the Board shall be paid notwithstanding that an appeal is taken therefrom and any amounts paid may be dealt with as the Appeals Tribunal shall direct.

(3) Upon receipt of a notice under subsection (1), the Board shall forthwith transmit the Board's records related to the appeal to the chairman of the Appeals Tribunal. (S.O. 1984, c. 58, s. 32)

86k. ***Rules.*** The Appeals Tribunal shall determine its own practice and procedure and may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers in respect thereto, and may prescribe such forms as it considers necessary. (S.O. 1984, c. 58, s. 32)

86l. ***Powers of Appeals Tribunal.*** The Appeals Tribunal may confirm, vary, reverse or uphold any decision of the Board under appeal.

(2) Every decision of the Appeals Tribunal and the reasons therefor shall be communicated promptly in writing to the Board and the parties of record. (S.O. 1984, c. 58. s. 32)

86m. ***Application of certain sections.*** Sections 76, 80 and 81 apply with necessary modifications to the Appeals Tribunal as if a reference to the Board were a reference to the Appeals Tribunal. (S.O. 1984, c. 58, s. 32)

86n. ***Determination of issues by Board.*** (1) Where a decision of the Appeals Tribunal turns upon an interpretation of the policy and general law of this Act, the board of directors of the Board may in its discretion review and determine the issue of interpretation of the policy and general law of this Act and may direct the Appeals Tribunal to reconsider the matter in light of the determination of the board of directors.

(2) Where the board of directors of the Board in the exercise of its descretion under subsection (1) considers that a review is warranted, it shall either hold a hearing and afford the parties likely to be affected by its determination an opportunity to make oral and written submissions or it may dispense with a hearing if it permits the parties likely to be affected by its determination to make written submissions, as the board may direct.

(3) The board of directors of the Board shall give its determination and direction, if any, under this section in writing together with its reasons therefor.

(4) Pending its determination, the board of directors of the Board, with respect to the decision that is the subject-matter of the review, may stay the enforcement or execution of the order made under the decision or may vacate the order if it has been implemented. (S.O. 1984, c. 58, s. 32)

86o. ***Appeals.*** (1) An appeal to the Appeals Tribunal lies from a decision of the Board with respect to the matters referred to in clauses 86g (1)(b) and (c).

(2) With the leave of the Appeals Tribunal, a decision of a panel of the Board made before this section comes into force may be appealed by the Appeals Tribunal.

(3) Leave to appeal a decision to which subsection (2) applies shall not be granted unless:

(a) there is substantial new evidence which was unavailable at the time of the hearing by the panel: or

(b) there appears to the Appeals Tribunal to be good reason to doubt the correctness of the decision.

(S.O. 1984, c. 58, s. 32)

86p. ***Industrial Disease Standards Panel.*** (1) There is hereby constituted a panel to be known as the Industrial Disease Standards Panel.

(2) The Panel shall be composed of not more than nine members including persons representative of the public and of the scientific community and technical and professional persons.

(3) The members of the Panel shall be appointed by the Lieutenant Governor in Council one of whom shall be designated by the Lieutenant Governor in Council as chairman of the Panel and one of whom shall be designated by the Lieutenant Governor in Council as vice- chairman.

(4) The remuneration, benefits and allowances of the members of the Panel shall be determined by the Lieutenant Governor in Council.

(5) The chairman of the Panel, subject to such guidelines as may be established by the Management Board of Cabinet and subject to the provisions of the *Crown Employees Collective Bargaining Act*, may establish job classificaitons, personnel qualifications and ranges for remuneration and benefits for officers and employees of the Panel, and the chairman may appoint, promote and employ the same in conformity with the classification, qualifications and ranges for remuneration and benefits so established by the chairman.

(6) The costs and expenses associated with the administration of the Panel, including the remuneration and expenses of its members, officers and employees, shall be paid by the Ministry of Labour and shall

be chargeable by the Ministry to the Board and the costs and expenses shall form part of the administrative expenses of the Board.

(7) It shall be the function of the Panel,

(a) to investigate possible industrial diseases;

(b) to make findings as to whether a probable connection exists between a disease and an industrial process, trade or occupation in Ontario;

(c) to create, develop and revise criteria for the evaluation of claims respecting industrial disease: and

(d) to advise on eligibility rules regarding compensation for claims respecting industrial disease.

(8) The Panel may establish special panels to investigate matters arising out of its functions under subsection (7) and may appoint *ad hoc* members who are specialists in particular diseases and in industrial processes to such special panels which shall report thereon to the Panel.

(9) The Panel shall determine its own priorities, practice and procedure and shall not be subject to or affected in any way by the *Statutory Powers Procedure Act*, or by any rules made under it.

(10) The Panel shall report its findings to the Board.

(11) Before accepting or rejecting any findings of the Panel, the Board shall publish in *The Ontario Gazette* a notice setting forth the nature of the findings and calling for comments, briefs and submissions thereon to be filed with the Board within sixty days of the publication of the notice or within such longer period as the Board may specify in the notice.

(12) Upon the expiry of the period allowed for the filing under subsection (11), the Board may accept the findings of the Panel with or without amendments or may reject the findings.

(13) Where the findings of the Panel are accepted under subsection (12) with amendments or rejected, the Board need not give any further notice under subsection (11).

(14) Where the Board accepts or rejects the findings of the Panel, notice of the Board's acceptance or rejection, with reasons therefor, shall be published in *The Ontario Gazette*.

(15) The Panel shall, after the close of each year, file with the Minister of Labour an annual report upon the affairs of the Panel, and the Minister shall cause a copy of the report to be laid before the assembly if it is in session or, if not, at the next ensuing session. (S.O. 1984, c. 58, s. 32)

86q. ***Office of Worker Adviser.*** (1) The Minister of Labour shall establish an office to be available to any person who is or has been a claimant for benefits under this Act and the office shall be known as the "Office of the Worker Adviser."

(2) The Minister shall pay such remuneration and expenses as may be required to carry out such functions as may be assigned to the Office of the Worker Adviser by the Minister.

SCHEDULE B

NOVA SCOTIA WORKERS COMPENSATION ACT

134. *Quorum.* A majority of the members appointed shall constitute a quorum of the Board. (S.N.S. 1978-79, c. 38, s. 8)

135. *Vacancy in Board does not impair authority of remaining members.* A vacancy in the board shall not, if there remain two members of it, impair the authority of such two members to act.

136. (1) ***Power of Board to enforce attendance of witnesses and to examine them.*** The Board shall have the like powers as the Supreme Court for compelling production of books, papers, documents and things.

(2) ***Power of single member of Board.*** A member of the Board sitting alone shall have all such powers, rights and privileges as are visted in a justice of the peace by Sections 22 to 28 of the Summary Convictions Act in respect of the following matters:

(a) enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;

(b) compelling the production of the books required to be kept by an employer either by this Act of by any regulation of the Board made under this Act; and

(c)punishing persons guilty of contempt;

and a summons signed by one member of the Board may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of the witnesses and compelling the production of documents.

137. *Jurisdiction of Board on questions of fact and law.* The Board has jurisdiction to inquire into, hear and determine all matters and questions of fact and law necessary to be determined in connection with compensation payments and the administration thereof and the collection and management of the funds therefor.

138. (1) ***Board's authority to invest and borrow.*** The Board has power, and shall be deemed always to have had power from time to time:

(a) to invest any funds arising under any provisions of this Part or under its control in any securities authorized for the investment of trust funds and to sell and dispose of any such securities and to reinvest the proceeds of such sale in securities authorized as aforesaid, or to use such proceeds for any of the purposes authorized by this Act.

(b) to borrow by way of overdraft or otherwise, from any chartered bank such sums as, in the opinion of the Board, may be deemed expedient for the proper carrying out of the provisions of this Act.

(2) ***Funds of Board exempt from taxation.*** The funds, investments and income of the Board shall be free from every form of taxation.

139. *Finality of Board's decision.* Except as stated in Sections 159A, 159N and 159O the decisions and findings of the Board upon all questions of law and fact shall be final and conclusive, and in particular, but not so as to restrict the generality of the powers of the Board hereunder, the following shall be deemed to be questions of fact:

(a) the question whether an injury has arisen out of or in the course of an employement within the scope of this Part;

(b) the existence and degree of disability by reason of any injury;

(c) the permanence of disability by reason of any injury;

(d) the degree of diminution of earning capacity by reason of any injury;

(e) the amount of average earnings;

(f) the existence of the relationship of a member of the family;

(g) the existence of dependency;

(h) the character, for the purpose of this Part, of any industry, employment, establishment or department and the class to which such industry, employment, establishment or department should be assigned;

(i) whether or not any employee in any industry within the scope of this Part is himself within the scope of this Part and entitled to compensation thereunder;

(j) the question whether a disease other than a disease mentioned in Schedule A is an industrial disease under this Act;

(k) whether or not any person is a worker, a subcontractor, or a contractor, or an employer within the meaning of this Part.

140. Repealed.

141. Repealed.

142. (1) ***Regulations by Board.*** The Board may make such regulations as may be deemed requisite for the due administration and carrying out of the provisions of this Part.

(2) ***Approval and publication.*** All regulations made under the authority of this Part shall come into force when approved by the Governor-in-Council and published in the Royal Gazette.

(2)(*sic*) ***Tax exemption and grant.*** Real property purchased or otherwise acquired by the Board is not subject to municipal taxation; however, the Board may pay to the City of Halifax a grant in respect of any real property exempt from taxation under the provisions of this Section and may make such agreements as may be necessary to give effect thereto.

152. ***Time of and procedure at sittings.*** The Board shall sit at such times and conduct its proceedings in such manner as it deems most convenient for the proper discharge and speedy dispatch of business.

153. (1) ***Officers of Board.*** The Board shall appoint a secretary, a chief medical officer, one or more assistant medical officers and such auditors, actuaries, accountants, inspectors, officers, clerks, and servants as the Board may deem necessary for carrying out the provisions of this Part, and may prescribe their duties, and every person so appointed shall hold office during the pleasure of the Board.

(2) ***Remuneration.*** The salaries or other remuneration of the persons so appointed shall be fixed by the Board and shall be paid out of the Accident Fund as administration expenses pursuant to Section 159.

154. (1) ***Application of Public Service Superannuation Act to Board members and employees.*** For all purposes of the Public Service Superannuation Act, every member of the Board and every person employed by the Board pursuant to the provisions of Section 153 shall be deemed to be a person employed in the public service of the Province and service in employment of the Board shall be deemed to be and to have been public service.

(2) ***Payments by members and employees into Superannuation Fund.*** The Board shall deduct monthly from the salary of every member of the Board and every employee thereof such amount as is directed by the Governor-in-Council to be deducted from the salary of every employee in the public service of the Province and shall pay over the same to the Minister of Finance and Economics, which amounts when so received shall be paid into and form part of the Superannuation Fund under the Public Service Superannuation Act.

(3) ***Payments of Board respecting Superannuation.*** Where by the Public Service Superannuation Act any payment is directed to be made into the said Superannuation Fund by the Government or by the Minister of Finance and Economics, or where by such Act any superannuation allowance or other sum is directed to be paid out of the Consolidated Fund of the Province, then in respect of any member or employee of the Board such payment, superannuation allowance or other sum shall be paid by the Board out of the Accident Fund.

155. ***Evidence of records of Board.*** A copy of or an extract from an entry in any book or record of the Board or of or from any document filed with the Board, purporting to be certified by the Secretary of the Board or by such other officer of the Board as may be appointed for that purpose by the Board to be a true copy or extract and to be sealed with the seal of the Board, shall be received in any court as *prima facie* proof that such copy or extract is a true copy or extract or that such document was filed with the Board without proof of the Secretary's or other officer's appointment, authority or signature or of the seal.

156. (1) ***Inquiry by members or officers of Board.*** The Board may act upon the report of any of its officers, and any inquiry which it shall be deemed necessary to make may be made by any one of its members or by an officer of the Board or some other person appointed to make the inquiry, and the Board may act upon his report as to the result of the inquiry.

(2) ***Authority of person conducting inquiry.*** The person appointed to make the inquiry shall for the purposes of the inquiry have all the powers conferred upon the Board or a member by Section 136.

157. ***Audit of Board's accounts.*** The accounts of the Board shall be audited by an auditor appointed by the Governor-in-Council for that purpose, and the salary or remuneration of such auditor shall be fixed by the Governor-in-Council and paid by the Board.

158. ***Annual report of the Board.*** The Board shall each year make a report to the Minister of Labour of its transactions during the next preceding calendar year.

159. (1) ***Administrative expenses payable out of Accident Fund.*** All expenses incurred in the administration of this Part shall be paid out of the Accident Fund.

(2) ***Effective date.*** This Section shall come into force on and not before the first day of July, 1968.

Part IA

Workers' Compensation Appeal Board

159A. (1) In this Part, "Appeal Board" shall mean the Workers' Compensation Appeal Board.

(2) There shall be an Appeal Board known as the Workers' Compensation Appeal Board consisting of not less than three nor more than five members, one of whom shall be designated as Chairman and one of whom may be designated as Assistant Chairman, to be appointed by the Governor-in-Council.

(2A) Notwithstanding subsection (2), the Governor in Council may appoint a person, who may or may not be a member of the Appeal Board, as Vice-Chairman of the Appeal Board to act in the place of the Chairman or Assistant Chairman during any time or in respect of any matter that the Governor in Council may designate and the Vice-Chairman shall be deemed to be a member at all times while so acting. (S.N.S. 1982, c. 51, s. 9)

(3) The Chairman and each member of the Appeal Board shall hold office for such period of time as is determined by the Governor-in-Council, and may be removed for cause by the Governor-in-Council at any time prior to the expiry of his term of appointment.

(4) Upon the expiry of his term office, a member may be reappointed.

(5) The Chairman and other members of the Appeal Board shall be paid such salary, emoluments and allowances as are determined from time to time by the Governor-in-Council.

159B. (1) The Chairman is the chief executive officer of the Appeal Board and shall preside at sittings of the Appeal Board at which he is present, and shall designate another member to preside at any sittings of the Appeal Board at which he is not present.

(2) Three members of the Appeal Board constitute a quorum and the decision on any appeal of a majority of members of the Appeal Board present at the hearing thereof shall be a decision of the Appeal Board.

159C. Where the Chairman or any other member is ill or otherwise unable to act or where his office is vacant, the Governor-in-Council may appoint an acting Chairman or acting member who for the period of his appointment has all the powers and shall perform all the duties in respect of the Chairman or the member for whom he is acting until such time as the office may be filled.

159D. The Chairman shall arrange the time and place of hearings before the Appeal Board and shall notify the parties of same.

159E. A person aggrieved by a decision of the Workers' Compensation Board may appeal to the Appeal Board on the grounds that:

(a) the medical opinion upon which compensation was given or refused was erroneous or incomplete; or

(b) a greater functional disability exists than that found by the Board; or

(c) a continuance of compensation beyond the period allowed by the Board is required.

159F. (1) Where a party wishes to appeal a decision of the Workers' Compensation Board to the Appeal Board, he shall serve a written Notice of Appeal upon the Workers' Compensation Board, the Appeal Board and any other parties interested in the decision.

(2) Such Notice of Appeal shall be filed with the Appeal Board and served pursuant to subsection (1) within one year from the day the Board's decision was communicated to the person appealing, or within such future time as the Appeal Board may allow; provided however that no extension of time allowed by the Appeal Board shall exceed ninety days from the date such extension was given. (S.N.S. 1983, c. 51, s. 10)

159G. (1) All documents, reports, and files in the hands of the Board in respect of the claim of the appellant shall be transmitted to the Appeal Board upon the request of the Chairman of the Appeal Board and shall be available for scrutiny by the appellant, his counsel and agent.

(2) Upon the Appeal Board making its decision, all reports, documents and files, transmitted to it by the Board shall be returned forthwith to that Board by the Appeal Board.

159H. Where a Notice of Appeal has been filed, the Appeal Board shall set the time and place of the hearing, upon consultation with the appellant, where applicable.

159I. (1) An appeal to the Appeal Board shall be open to the public except where the Chairman is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public in which case the Appeal Board may hold the hearing concerning any such matters in camera.

(2) Members of the Appeal Board holding a hearing shall not have taken part in any investigation or consideration of the subject matter of the hearing and shall not communicate directly or indirectly in relation to the subject matter of the hearing with any person or with any party or with his representative except upon notice to and opportunity for all parties to participate, but the Appeal Board may seek legal advice from an adviser independent from the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law.

(3) The oral evidence taken before the Appeal Board at a hearing shall be recorded and, if so required, copies of the recording or a transcript thereof shall be furnished upon the same terms as in the Supreme Court.

(4) The findings of fact of the Appeal Board pursuant to a hearing shall be based exclusively on evidence admissible under Section 159J or matters that may be noticed under those Sections.

(5) No members of the Appeal Board shall participate in a decision of the Apeal Board pursuant to a hearing unless he or she was present throughout the hearing and heard the evidence and argument of the parties.

(6) Documents and things put in evidence at the hearing shall, upon the request of the person who produced them, be released to him or her by the Appeal Board within a resonable time after the matter in issue has been fully determined.

159J. (1) Subject to subsections (2) and (3), the Appeal Board may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court;

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject matter of the proceedings and may act on such evidence, but the Appeal Board may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by any statute.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

(4) Where the Appeal Board is satisfied as to their authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

(5) Where a document has been filed in evidence at a hearing, the Appeal Board may, or the person producing it or entitled to it may with the leave of the Appeal Board, cause the document to be photocopied and the Appeal Board may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the Appeal Board.

(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a true copy thereof by a member of the Appeal Board is admissible in evidence in proceedings in which the document is admissible as evidence of the document.

159K. (1) The Appeal Board may summon independent medical advice where medical evidence is in dispute or as it deems necessary; provided however that notice of same shall be given to the appellant and that the appellant has ample opportunity to refute such testimony.

(2) The provisions 159I and 159J shall apply to this Section.

159L. (1) The Appeal Board has authority to determine any question of law or fact as to whether any benefit is payable to a person and the amount of any such benefit and the decision of the Appeal Board, except as provided in this Act, is final and binding for all purposes of this Act.

(2) The Board or the Appeal Board may, notwithstanding subsection (1), on new facts amend or rescind a decision made under this Act by the Board or the Appeal Board, as the case may be.

(3) The Appeal Board may affirm or vary a decision of the Board and may take any action in relation thereto that might have been taken by the Board under the Act.

(4) A decision of the Appeal Board shall be effective from the date the appeal is filed or from such earlier date as the Appeal Board might determine, but not prior in time to the entitlement to Workers' Compensation.

(5) The Appeal Board shall, where it makes a determination as to the entitlement of compensation of the appellant, advise the appellant, the employer and the Board within thirty days of the particulars of its determination, and shall provide a summary of its reasons, including medical reasons, for its decision upon request.

159M. (1) Except where otherwise provided, any notice required by this Act to be served may be served personally or by registered mail and where notice is served by registered mail, the service shall be deemed to have been made on the fifth day after the day of mailing thereof.

(2) Notwithstanding subsection (1), the Appeal Board may order any other method of service in respect of any matter before the Appeal Board.

159N. (1) An appeal shall lie to the Appeal Division of the Supreme Court from any final decision of the Appeal Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only by leave of a judge of the Appeal Division, given upon applicaiton for leave to appeal which must be made to said judge within thirty days after the rendering of the decision, and upon such terms and conditions as the judge may determine.

(2) Notice of the hearing on the application for leave to appeal pursuant to subsection (1) shall be given to the Appeal Board at least two clear days before the application is heard.

(3) Where leave to appeal has been granted, the appeal shall be brought by notice served on the chairman or other member of the Appeal Board within ten days after the leave to appeal has been granted. The notice shall contain the name of the parties and the date of the order appealed from, and such other particulars as the judge granting leave to appeal may require.

(4) On the hearing of such appeal any association representing a class interested in the result of the case shall be entitled to appear and be heard.

(5) Any appeal to the Appeal Division of the Supreme Court pursuant tothis act shall be subject to the Civil Procedure Rules.

159O. (1) The Appeal Board may of its own motion state a case in writing for the Appeal Division of the Supreme Court upon any question which in the opinion of the Appeal Board is a question of law.

(2) The Appeal Division of the Supreme Court shall hear and determine the questions or questions of law arising thereon and remit the matter to the Appeal Board, with the opinion of the Court thereon.

(3) No costs shall be awarded in any appeal or in a case stated under this Section.

159P. (1) The Appeal Board may, subject to the approval of the Minister, engage the services of such counsel, physicians, accountants, and other experts to advise it in respect of matters as it deems necessary for the efficient carrying out of its duties and functions under this Act and such persons shall be paid such compensation as is determined by the Minister.

(2) Such other officers and employees as are necessary to enable the Appeal Board to perform its duties shall be appointed in accordance with the Civil Service Act.

(3) The compensation paid to those persons engaged pursuant to subsection (1) and those persons engaged pursuant to subsection (2) in accordance with the Civil Service Act shall be paid out of the Accident Fund, defined by Clause (a) of Section 1.

(4) For all purposes of the Public Service Superannuation Act, every full time member of the Appeal Board and every full time employee of the Appeal Board shall be deemed to be a person employed in the Public Service of the Province and full time service in the employment of the Appeal Board shall be deemed to be Public Service.

159Q. (1) Subject to the approval of the Governor-in-Council the Appeal Board may make regulations:

(a) for the management, administration and conduct of the Appeal Board and any hearings before it;

(b) defining any expression used in this Part and not herein defined; and

(c) respecting any other matter or thing that is necessary to effectively carry out the intent and purpose of this Part.

(2) The exercise by the Board of the authority set forth in subsection (1) shall be regulations within the meaning of the Regulations Act.

159R. All salaries remuneration, fees, costs, charges and expenses of the Appeal Board and of it members, officers, servants and persons engaged to advise it shall be paid out of the Accident Fund.

APPENDIX H

THE CHARTER OF RIGHTS AND SUBSTANTIVE WORKERS' COMPENSATION LAW

I. INTRODUCTION

The Canadian Charter of Rights and Freedoms[1] poses two different degrees of challenge to Workers' Compensation legislation.

The first degree of challenge is that faced by all legislation—are there specific provisions of the Act which severally violate any of the rights guaranteed and entrenched in the Charter? If such is judicially determined to be the case, then individual sections of the Act will be struck down as unconstitutional. Striking down individual sections usually changes specific aspects of the overall effect of a piece of legislation but in practical terms, the general nature and operation of the legislation remain intact.

The second degree of challenge has the same nature as the first but the practical effect of striking down would be of a different degree altogether. Should those individual sections of Workers Compensation Acts which remove the workers' right to sue employers be struck down as unconstitutional, then, in practical terms, the entire structure of Workers' Compensation falls as an inevitable result.

To date, this latter area is where caselaw specifically dealing with Workers' Compensation has been concentrated. Accordingly, a large part of this paper will deal with the specific issue of the removal of the right to sue.

This paper will also deal with the identification of other broad areas where Workers' Compensation legislation (and specifically, the Manitoba statute) may face accusations of Charter violation and thus be vulnerable to attack. However, it will not examine the statute on an exhaustive, section-by-section approach.

II. DEALING WITH THE CHARTER

Two considerations may be helpful to keep in mind when dealing with the Charter and with caselaw interpreting the Charter:

1) The rights contained in the Charter are not absolute; they are limited. This holds true, of course, for any statement or document declaring the existence of civil liberties. But Canada is unique in that our Charter has an express provision to this effect; a provision which, moreover, lays down the basic parameters of the limitation.

Section 1, often uncharitably referred to as a "weasel" clause, states that:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It is possible for a statutory provision to violate a Charter right and yet not be struck down as a result, because the violation (or limitation) is found to be a "reasonable limit prescribed by law etc." Thus, section 1 is a "saving provision"; it can save a statute that might otherwise be struck down.

Section 1 will be considered in greater detail when dealing with the Charter challenge to the removal of the workers' right to sue.

2) Only judgments of the Supreme Court of Canada can effect national change. Judgments of a foreign (non-Manitoban) Court of Appeal may be of persuasive force to Manitoban jurists, but our courts are not bound to apply that particular decision as being conclusive of a legal issue. Once the Supreme Court of Canada has spoken, however, every court throughout Canada is bound to follow its view of the law.

Especially when dealing with the Charter, the supreme law of the land, no issue is really viewed as conclusively settled until the Supreme Court of Canada has ruled. Until then, it often happens that various courts will propound diametrically opposite views of the law or of the constitutionality of certain legislation. Even once the Supreme Court has established a precedent, it must be further honed, polished and sharpened by fine distinctions by other courts over a course of judgments and a number of years.

Thus it is helpful to keep in mind when dealing with Charter caselaw that the law in this area is still very much evolving, and many are the hairs which remain to be split.

III. SPECIFIC ISSUES IN WORKERS' COMPENSATION

A. RESIDENCY REQUIREMENTS

The constitutionality of statutory provisions which limit eligibility for compensation by criteria of residency within the province could well be scrutinized under section 6 of the Charter (the so-called "Mobility Rights"):

> **s. 6(2)** Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and

> (b) to pursue the gaining of a livelihood in any province.

At first glance, these rights (especially s. 6(2)(b)) appear very broad. The Supreme Court of Canada has, however, already stressed that s. 6(2)(b) does not entrench a free-standing "right to work," but rather:

> The two rights ... [subsections (a) and (b)] both relate to movement into another province, either for the taking up of residence, [subsection (a)] or to work without establishing residence [subsection (b)][2]

One important, specific limitation on the scope of Mobility Rights is contained in the Charter itself:

> **s. 6(3)** The rights specified in subsection (2) are subject to
>
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

This significantly limits the operation of "mobility rights," making breaches of such rights much narrower and more difficult to demonstrate than other rights entrenched in the Charter.

In Manitoba's *Workers Compensation Act*,[3] a series of sections (s. 4(7),(8) and s. 4.1(1)-(6)) delineate the criteria under which the Manitoba Workers' Compensation system will recognize the claims of workers whose accidents occur outside the province. (These sections are appended hereto as Schedule A.) One criterion for recognition is that the worker's residence must be in Manitoba, quite apart from the other criteria that the employer must have its place of business or chief place of business in Manitoba, and that the worker must usually work for the employer inside Manitoba. Surely, practically speaking, the crucial consideration for eligibility is whether the employer is obliged or has opted to pay the assessment on payroll for which the work may be performed outside Manitoba, and not whether the worker him/herself is a resident of Manitoba?

Note that the Act has no residency requirement concerning workers in industries under the Act, whose place of employment is thereby Manitoba, where the accident occurs in Manitoba.

Ordinarily, a province has no constitutional jurisdiction to legislate in regard to events which occur outside its territorial jurisdiction. But the courts have held that such Workers' Compensation sections are within the power of a legislature to pass. The reason is rather interesting:

> [I]n their lordships' opinion this is not a case in which it is sought to enact any law giving a right to arise from a source outside the Province. The right conferred arises ... and is the result of a statutory condition of the contract of employment made with a workman resident in the province, for his personal benefit and for that of members of his family dependent on him .... This right [to compensation] arises, not out of tort, but out of the workman's statutory contract and it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it as a benefit conferred on himself as a subject of the Province.[4]

The key relationship is that of the **contract** made within the province. A non-resident is perfectly capable, legally, of making a contract within a province where s/he does not reside. It is submitted that the residence of the contracting worker is superfluous, despite the constant association in the judges' minds of the contracting worker with a provincial resident.

Such residency requirements would today appear to breach s. 6(2)(b) of the Charter, if what that provision guarantees is the "right to commute to work across a provincial border without legal impediment or disadvantage."[5]

An initial objection might be that the phrase "gaining of a livelihood" means the active earning of wages, salary or profit and not the receipt of benefits under a statutory scheme. However, note that s. 6(3)(b) states that one limitation on the rights specified in s. 6(2) generally is laws having reasonable residency requirements for the receipt of "publicly provided social services." Obviously the Charter itself contemplates the phrase "gaining of a livelihood" to be broader than mere wages. Moreover, since workers' compensation benefits are based, not on arbitrarily defined need, but on a system of income replacement, it would seem absurd to say that they are not directly related to the active earning of wages, even should "gaining of a livelihood" have such a narrow meaning.

A far more serious objection is based on s. 6(3)(a). To paraphrase this section, mobility rights may be overridden by provisions contained:

i) in a law or practice;
ii) of general application;
iii) in force in a province; and
iv) such law or practice must not discriminate amongst persons primarily on the basis of past or present provincial residence.

The controversial criteria, for Workers' Compensation, are items ii) and iv).

What is a law of general application? This is a concept frequently used in constitutional law and it was defined by the Supreme Court of Canada in a pre-Charter case:

> There are two *indicia* by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be 'in relation to' one class of citizens in object and purpose. But the fact that a law may have graver consequences to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group.[6]

The second part of the test can involve conceptual difficulties. For example, a provincial law regulating the licensing requirements for hairdressers is potentially applicable equally to every person in the province, even though only those people who actually want to practice hairdressing must actively conform to the statute. But they are not being singled out from everyone else because of it. However, if the law regulated licensing requirements for Indian hairdressers, or hairdressers working in Brandon alone, then it would not be a law of general application, but of specific application.

Like the hairdressing example, it could be said that the *Workers Compensation Act* is potentially applicable equally to every person in the province, even though only those people who actually labour for wages in an included industry must actually conform to the statute.

Even if the law is of general application, the fourth criteria must be then assessed: does the provision discriminate "primarily" on the basis of residence? If it does, then the saving effect of s. 6(3)(a) cannot be relied upon.

The crucial issue is the meaning which the courts will assign to the word "primarily." Note that with the workers' compensation provisions concerning residency and eligibility for out-of-province accidents, there are other criteria to be met apart from the worker's province of residence. Similarly, in s. 88(9) of our *Workers Compensation Act*, note the dual criteria of residency and exposure to silica dust:

> **88 (9)** Subject to subsection (11), nothing in this Act entitles a workman or his dependants to compensation, medical aid, or payment of burial expenses, for disability, or death from silicosis, unless the workman has been a resident of Manitoba for a period of at least two years next preceding his first disablement and has been actually exposed to dust containing silica in employment in any industry within the scope of this Part in Manitoba for periods amounting in all to at least two years preceding his disablement.

Similarly, s. 6(1) of our *Act* arguably contains dual preconditions to the operation of the section: non-residency, and the presence of reciprocal legislation in the dependent's home province:

> **6 (1)** Where a dependant is not a resident of Manitoba, he is not entitled to compensation unless, by the law of the place or country in which he resides, the dependants of a workman to whom an accident happens in that place or country if resident in Manitoba would be entitled to compensation; and where the dependants would be entitled to compensation under that law, the compensation to which the non-resident dependant is entitled under this Part is not greater than the compensation payable in the like case under that law.

Could the courts interpret "primarily" as meaning, for all intents and purposes, "solely"? A common sense understanding of English usage would seem to dictate against such an interpretation, but the Manitoba Queen's Bench, in a different context and interpreting a different statute, did once interpret the word "primarily," in effect, this way.[7]

However, the better view is that "primarily" would be interpreted as meaning "'mostly, chiefly, principally, or in the main.'"[8] It then becomes a problem of assigning relative values to the requirements of a given section. So, for example, in the aforementioned s. 88(9), is the residency requirement more or less important than the exposure requirement?

What if both, or all, requirements of a section are equally important? There is authority from other areas of the law that, where two different things are each of "substantial significance," then it cannot be said that one is primary and the other is secondary.[9] So, for example, if the residency requirement and the exposure requirement are equally important, then s. 88(9) cannot be said to discriminate primarily on the basis of residence; hence s. 6(3)(a) of the Charter could validate the breach of mobility rights.

Does the exception in s. 6(3)(b) of the Charter work to protect any of these provisions? Only if workers' compensation benefits could be considered as "publicly provided social services" and given that they are privately funded by assessment and distributed, not on a basis of need but as a compensatory right, there seems little hope that s. 6(3)(b) could be of assistance.

Even if the provisions discussed could not be saved under s. 6(3) of the Charter, the breach of mobility rights might still be justifiable under s. 1 of the Charter. Are they reasonable limits, demonstrably justifiable in a free and democratic society?

While there has not yet been, to date, a tremendous volume of caselaw on mobility rights, there has been enough to demonstrate that courts are very slow to strike down residency requirements, and in doing so rely heavily on the saving provisions of sections 6(3) and 1.

Needless to say, there has not yet been a court decision concerning residency requirements in Workers' Compensation. One case concerning other legislation may, however, be of interest.

In *Basile* v. *Attorney-General of Nova Scotia*,[10] a regulation under the *Direct Sellers' Licensing and Regulations Act* provided that only permanent residents of Nova Scotia could be licensed as direct-selling salespeople. It was held by the Court of Appeal of that province to violate the right to pursue the gaining of a livelihood in any province without being a resident thereof, and that this violation of s. 6(2)(b) of the Charter was not saved by s. 6(3)(a). Although the Act was a law of general application, the primary ground (indeed, the only ground) for discrimination was residency, so s. 6(3)(a) could not be relied upon.

The argument was then made that such a restriction was a reasonable limit on mobility rights, demonstrably justified in a free and democratic society. The restriction was designed, it was argued, to protect the public from fraudulent transactions and abuses from out-of-province direct sellers. The court rejected this section 1 argument because the province failed to demonstrate that licensing and bonding alone were insufficient to protect the public.[11]

B. BOARD'S RIGHT OF ENTRY AND INSPECTION

The Manitoba legislature has given the Workers Compensation Board power to deal with recalcitrant employers who may not, among other things, want to pay their full or indeed, any, assessment. One such power is contained in s. 83 of our *Workers Compensation Act*:

> **83(1)** The board and any officer, worker adviser or person authorized by it for that purpose may, at all reasonable hours, enter into the establishment of any employer who is liable to contribute to the accident fund under this Part, and the premises connected with it, and every part of them, for any purpose which the board may deem necessary.
>
> **83(2)** Any employer and every other person who obstructs or hinders the making of any inspection under subsection (1), or refuses to permit it to be made, is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five hundred dollars.

Apart from the restriction about "reasonable hours," this section provides what appears to be open-ended search powers (although the word "search" is not explicitly used), the exercise of which is at the sole discretion of the Board: "for any purpose which the board may deem necessary." Note that, unlike the search powers of most administrative or investigative agencies (not to mention the police), there is no need for a warrant, nor even the obligation to have "reasonable and probable grounds" to suspect anything at all. That this section provides more than just a mere statutory right of entry (an innocuous enough power frequently granted to public utilities like Hydro and the Telephone System), is made clear, it is submitted, by the use of the word "inspection" in s. 83(2).

Given the performance of courts to date in this area it seems possible that s. 83 might well be struck down, if challenged, for violating s. 8 of the Charter:

> **8** Everyone has the right to be secure against unreasonable search or seizure.

The problem should be stated, not in terms that the Board should never have entry, search or investigative powers, but rather, that the width and lack of control over the use of such power is the true threat to Charter rights.

What appears to be emerging from the caselaw is a sliding scale of procedural requirements that is the most demanding with administrative agencies whose investigations lead to criminal charges, and less demanding with administrative agencies whose investigations lead to civil consequences.

So, for example, in the case of *Hunter* v. *Southam Inc.*,[12] the Combines Investigation Branch was permitted, under the *Combines Investigation Act*, to enter and search any premises where the Branch Director believed there "may" be evidence relevant to an investigation. No warrant was required, merely a certificate from a member of the Restrictive Trade Practices Commission. Breaches of the *Combines Investigation Act* are classified as offences carrying criminal penalties (fines, etc.).

The Supreme Court of Canada struck down the section, because even though prior authorization (the certificate) had to be sought before a search could occur, the person(s) from whom the prior authorization was sought could not be said to be truly neutral and detached since the Restrictive Trade Practices Commission is itself an investigatory body dealing in the same area as the Combines Investigation Branch.

Moreover, to allow such a search merely because of a reasonable belief that there "may" be relevant evidence thereby uncovered is too low a standard "for identifying the point at which the interests of the state in such intrusions comes to prevail over the interests of the individual in resisting them."[13] At the minimum, where the state interest is simply law enforcement, the standard must be the establishment upon oath of reasonable and probable grounds to believe that an offence has been committed and that there **is** evidence to be found at the place of the search.

As stated, these requirements are watered down for administrative agencies whose function is not to investigate offences but merely to enforce purely administrative or regulatory matters. This distinction originated in Ontario and has since spread.

So, for example, in *Re Belgoma Transportation Ltd.*,[14] it was held to be reasonable that, under the *Employment Standards Act*, an employment standards officer could enter business premises (but not private dwellings) without a warrant and demand the production of records for inspection and copying, particularly because the demand could be refused by the employer without a physical search or seizure resulting.

Similarly, in *Re Cole and F. W. Woolworth Co. Ltd.*,[15] it was held to be reasonable for the *Saskatchewan Human Rights Code* to authorize entry without a warrant or prior authorization onto premises involved in a complaint and to demand production and copying of documents. Again, the right to refuse such a demand was present and would lead to judicial determination of the issue of production.

In Manitoba our Court of Appeal has held that a simple statutory demand for production of documents under the *Public Utilities Board Act* does not constitute unreasonable search or seizure, since the scope of the demand and the relevancy of the documents sought may be challenged at the hearing before the Public Utilities Board.[16] The section considered did not, however, involve actual entry onto premises.

It is submitted that the lesser standard of procedural requirements would probably be used by a court in considering s. 83 of our *Workers Compensation Act*. The investigations carried out by the Board do not themselves result in criminal sanctions, but are more properly classified as civil in nature. For example, if employers default in making assessment payments, the certificate of the Board to that effect is registered in court and becomes civilly enforceable like any court judgment (seizure and sale of goods by sheriff, garnishment of bank accounts, etc.): s. 70(2). Nowhere in the Act is the Board itself empowered to impose fines as a punishment following an investigation. There are financial penalties imposed for failure to make returns or to pay assessments (s. 71) but such penalties are statutorily automatic and not the result of adjudication by the Board itself, although the Board may forgive such penalties. Again, while some sections do create technically quasi-criminal offenses punishable by fine upon summary conviction (e.g.: s. 81(2), s. 83(2), s. 84(2)), the adjudicating body which would investigate, convict and pass sentence would be the Provincial Court of Manitoba, not the Board itself.

Therefore, as in the *Re Belgoma Transportation* case, the authority given by s. 83 to enter business premises without a warrant or prior authorization could well be held not to constitute unreasonable search power (in and of itself) under s. 8 of the Charter. However, it is submitted, it is another thing for s. 83 to authorize such entry "for **any purpose** which the **board** may deem necessary." This wording is altogether too wide and devoid of safeguards against capricious arbitrariness.

When s. 83(1) is read in combination with ss. 82(1) and (2), it would appear arguable that the Board, in entering premises, could seize and remove books and accounts. S. 82(1) and (2) provide that:

> **Examination of books of employer.**
>
> **82(1)** The board, and any officer or person authorized by it for that purpose, may examine the books and accounts of the employer, and make such other inquiry as the board may deem necessary for the purpose of ascertaining whether any statement furnished to the board is an accurate statement of the matters that are required to be stated therein, or of ascertaining the amount of the payroll of any employer, or of ascertaining whether any industry or person is under the operation of this Part; and for the purpose of any such examination and inquiry the board and the person so appointed has, in addition to all the powers conferred by this Act, all the powers that may be conferred on a commissioner under Part V of The Manitoba Evidence Act.
>
> **Notice to employer to produce books, etc.**
>
> **82(2)** For the purpose of any such examination or inquiry, the board or person authorized to make the examination or inquiry may give to the employer or his agent notice in writing requiring him to bring or produce before the board or person, at a place and time to be mentioned in the notice, which time shall be at least ten days after the giving of the notice, all documents, writings, books, deeds, and papers, in the possession, custody, or power, of the employer, touching, or in anyway relating to or concerning, the subject matter of the examination or inquiry referred to in the notice; and every employer and every agent of the employer named in and served with any such notice shall produce, at the time and place required, all such documents, writings, books, deeds, and papers, according to the tenor of the notice.

Note that, while the Board is authorized by s. 82(1) to examine books, the wording of s. 82(2) is permissive, not mandatory—i.e. it is up to the Board whether it wishes to serve a written Notice to Produce or not. Combining this right to "examine" without notice with the ability under s. 83(2) to enter "for any purpose" could produce a fact situation amounting to arbitrary, unreasonable search or seizure.

C. REMOVAL OF RIGHT TO SUE

As stated previously, it is in the area concerning removal of the workers' right to sue the employer and certain others at common law for damages in tort (s. 7(7) and s. 10(1) of our *Act*) that the major court challenges to the Workers' Compensation system have occurred to date.

Because of the three year delay in the coming into effect of s. 15 of the Charter ("Equality Rights"), the initial challenges to the constitutionality of the removal of the right to sue proceeded under s. 7 of the Charter.

Section 7 provides that:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The first case dealing with this area was *Re Terzian and Workmen's Compensation Board*.[17] Without giving detailed reasons, the Ontario High Court of Justice held that the right to sue for damages is not a matter which falls within the definition of the phrase "security of the person." And even if it did fall within the definition, added the court, such a violation of the right to security of the person would be a reasonable limit demonstrably justified in a free and democratic society.

The Ontario High Court of Justice also decided the next case in the series, *Ryan* v. *Workmen's Compensation Board (Ont.)*.[18] Ryan had been severely injured in an explosion. He tried to bring two court actions: one against the manufacturer and distributor of the explosive, and the other against his employer. The Workers Compensation Board ruled that both suits could not be brought.

Ryan's Charter argument was in relation only to the first suit. The manufacturer was a Schedule 1 employer under the *Workers Compensation Act*, although it was not of course Ryan's own employer. Ryan was a Schedule 1 worker. The *Act* removes the right of Schedule 1 workers to sue any Schedule 1 employer whatsoever. Schedule 2 workers, however, have a choice between suing and receiving workers' compensation.

It was argued on Ryan's behalf that this discrimination in the *Act* between Schedule 1 and 2 workers violated s. 7 of the Charter. Again the court avoided giving a detailed analysis of its reasons. It simply stated that it was bound to follow the *Terzian* case and, accordingly, held that the Charter was not breached.

The last attempt to use s. 7 to attack the removal of the right to sue occurred in *Budge* v. *Workers' Compensation Board*.[19] The standard argument was made that removal of the right to sue violated "security of the person" guaranteed in s. 7.

The Alberta Queen's Bench relied heavily on the interpretation of "security of the person" which had been enunciated by the Federal Court of Appeal in the *Operation Dismantle* case (where peace activists argued that Cruise missile testing violated the "security of the person" of all Canadians):

> 'The respondents assumed in their argument that the right to "security of the person" guaranteed by s. 7 is the right of every person to be protected against any danger and provided with the necessaries for his well-being. If such an interpretation of the phrase...were to prevail, most statutes and governmental decisions could be challenged in court by those contesting their wisdom or opportunity. This points to the desirability of giving to the words "security of the person" in s. 7 a narrower meaning.... The only security that is protected by that provision is...security against arbitrary arrest or detention.'[20]

The court also agreed with the *Terzian* case in rejecting the argument.

The section 7 argument, while imaginative, was never particularly compelling. The real weapon against the removal of the right to sue is found in s. 15 of the Charter. The s. 15 challenge has been slow in coming, since that section did not come into force until April, 1985, but it should come to a head within the next year or so before the Supreme Court of Canada.

> Section 15 (1) provides that:
>
> **15. (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The leading (and only) case to date on s. 15 and workers' compensation is of course the recently decided *Piercey* v. *General Bakeries Limited*.[21] The question of the moment is whether the decision of the Newfoundland Supreme Court striking down the removal of the right to sue will stand on appeal.

Factually, the case is very simple. Mrs. Piercey's husband was killed on the job. She received survivor benefits under workers' compensation and wants to sue his employer. Quite apart from the constitutionality of the sections removing her right to sue, Mrs. Piercey has an insuperable factual problem with her case. Her husband was killed before s.15 came into effect. It is settled law that the Charter does not act retrospectively. Therefore, she cannot rely on the Charter to seek relief in this particular case. She must argue as if the Charter did not exist, which of course dooms her personal case to failure.

Ordinarily, this should have been an end to the matter and no comments should have been made on the constitutional issue. However, all parties agreed and it was ordered that the court would rule on the constitutional issue as if she were a party seeking merely a declaration from the court as to the meaning of a statute. Under this procedure (available in all provinces), facts are irrelevant. The court issues, in effect, a legal opinion.

Only in certain circumstances can a private citizen seek this kind of court opinion, although the criteria has recently been broadened. The court found that Mrs. Piercey had "standing," or, met the criteria to enable her to seek such declaratory relief.

If this case went to appeal in the ordinary way, a higher court could easily avoid having to deal with the constitutional question. It could overturn the decision concerning standing (thus ending the case) or, arguably, it could find the lower court's statements on the constitutional issue to be *obiter dicta* (mere opinion having no bearing on the facts of the case and so of no "official" legal worth) and thus unappealable. Higher courts, including (some might say, especially) the Supreme Court of Canada have often used the avoidance route when possible when dealing with thorny social issues.

However, it appears that the case will be appealed by way of reference,[22] which is to say that the Government of Newfoundland will (as is its privilege) "state a case" to its Court of Appeal and thus obtain a legal opinion without having to rely on any specific fact situation. The Government's standing is statutory and incontrovertible.

In any event, how did the Newfoundland Supreme Court strike down the removal of the right to sue?

Chief Justice Hickman spent a great deal of the judgment supporting and stating the view that s.15 itself entrenches the specific right to litigate within the Charter. He goes so far as to say that "Section 15 creates, and where appropriate, enshrines certain rights."[23]

It is submitted that this is an incorrect approach to the meaning and effect of s. 15. The rights entrenched by s. 15 are those of equality before and under the law, and the right to the equal protection and benefit of the law without discrimination. It necessitates a comparison between individuals or groups of individuals and guarantees that no unjustifiable differential treatment or legal status will be allowed. The **focal point** of the comparison (here, access to the courts) is not itself raised and enshrined as a constitutional right in s. 15. The entrenched right is equality, and not the right to do any specific kind of action.

Chief Justice Hickman properly framed the legal issue when he stated that:

> "The Plaintiff is saying, in effect, that she cannot have equal protection and equal benefit of the law without discrimination if she and people in her class are denied the right to litigate in the Courts of the land."[24]

He should have approached the issue by determining whether there is discrimination between workers covered by the *Workers Compensation Act* and workers not covered by the Act, and not by entrenching the right to litigate in s. 15.

There are many restrictions on general access to the courts, some of which are starting to be challenged under s. 15. For example, lawsuits must be filed in court within certain time periods or limitations. If people miss the time for filing, have they been denied equality of protection and benefit of the law as against people who do not miss the time for filing? Two courts have reached completely opposite conclusions: the Ontario High Court found s. 15 to be thereby violated;[25] the Saskatchewan Queen's Bench found no violation.[26]

A more thoughtful analysis of s. 15 and access to the courts was made by the Alberta Queen's Bench in *Kask* v. *Shimizu*.[27] Alberta courts, like those in other provinces, have a rule that when a person who lives outside the province sues in their courts, s/he may be compelled to post money with the court as "security for costs." A provincial resident who sues is not so compelled. Is this restriction on access between groups of people a violation of equal protection and benefit of the law?

Clearly this Rule of Court produces differential treatment of groups of plaintiffs. The real question then becomes

> whether s. 15(1) proscribes **every** kind of inequality between members of one group and members of another group, before and under the law, **every** kind of unequal protection and unequal benefit of the law, and **every** kind of discrimination.[28]

The court states that a "purposive" approach to the interpretation of s. 15(1) should be used—in other words, s. 15 protects essential, underlying principles of equality, not merely superficial equality. The judge found that it is an essential value in a democratic society that access to the courts must be available to people irrespective of their wealth. The Rule requiring posting of security for costs effectively denies access to the courts to poor people (quite apart from the issue of provincial residence). Such discrimination goes to the roots of our social values and so, even though it is not specifically enumerated among the prohibited grounds of discrimination in s. 15(1), such a restriction of access violates s. 15.

Returning to the *Piercey* case and the issue of denial of court access in workers' compensation, clearly there is differential treatment between workers covered by the Act and those not so covered. It is submitted that the proper question to be determined is whether such differential treatment violates an essential value of our society concerning access to the courts, rather than concluding that such access is entrenched in s. 15 in its own right.

In favour of violation, one might argue that it is an essential social value regarding court access that people should not be statutorily denied access simply on the basis of who they happen to work for. Or, if the discrimination is conceived as being, not between groups of workers, but as being between victims of job-related negligence and victims of non-job-related negligence, it might be argued that it is an essential social value that monetary compensation for injuries should not significantly differ according to where the incident occurred, so that restricting the court access of one group in order to produce this effect is repugnant.

Against violation, one might argue along the following lines. The purpose of free access to the courts is to ensure impartial adjudication of right and wrong—i.e. fault. Fault, or guilt, is always the primary, threshold point of and purpose of litigating. Damages flow only from a finding of fault. If fault is not an issue needed to be determined, but is, on the contrary, quite irrelevant, then no social value is harmed by restricting the court access of those to whom fault is irrelevant.

But what about the sometimes vast difference in monetary compensation? Such a difference is perceivable and comparable **only** if fault is at issue in **both** systems. To demonstrate this, consider the following: through his own negligence, a man suffers severe injuries at work. Under workers' compensation, he is nevertheless compensated. Another man, who is unemployed, suffers similar severe injuries through his own negligence. At common law, he would receive nothing. Has he been denied equal protection and benefit under the law, because he, not being a worker, is denied access to the no-fault system of compensation? If differential treatment pure and simple constitutes violation of s. 15, then he has been denied equal protection and benefit.

A worker receives smaller compensation than at common law only in those situations where the employer is perceived to be negligent. Everything comes back to the issue of fault, and to say that rights under a no-fault system must be equal to rights under a fault system is to compare apples and oranges and insist that they are the same.

Even if the removal of the right to sue does violate s. 15, the saving effect of s. 1 of the Charter must be considered. Is the removal of the right to sue a reasonable limit demonstrably justified in a free and democratic society?

Before returning to the *Piercey* case, a few comments are offered on s. 1 generally. Section 1 involves a two-step consideration:

1) is the **purpose** of the limit **demonstrably justified?**

The Supreme Court of Canada has stated that, at the minimum, the purpose of the limitation of Charter rights must relate to concerns which are "pressing and substantial."[29] If the purpose for restricting rights is related only to governmental concerns about cost and administrative convenience, this probably would be insufficient.[30]

If the purpose is not demonstrably justified then the Charter violation cannot be redeemed under s. 1, and the offending legislation must be struck down. If, however, the purpose is demonstrably justified, the court must then consider the second part of the test.

2) are the **means** which the limit entails **reasonable**? Trying to judge "reasonableness" involves several factors:

> One is good faith; the means employed must be genuinely intended to advance the professed purpose. Another is rationality; the means chosen must be such as can reasonably be expected to produce the desired results. The question of alternate means must also be addressed; while courts cannot design government policies, they have a responsibility, as Justice Dickson indicated, to ask whether the government's purpose could be achieved by other means less destructive of Charter rights. And, as the Dickson comment again points out, proportionality must always be considered: is the purpose being served worth the cost in terms of infringed rights and freedoms?[31]

The "proportionality test" is of crucial importance in judging reasonableness. The Supreme Court of Canada has recently elaborated upon the proportionality test and the delicate balancing of interests which the court must perform:

> Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question.... Thirdly, there must be a proportionality between the **effects** of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious

> effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[32]

In the *Piercey* case, Chief Justice Hickman found that the limitation of equality rights by the removal of the right to sue was not a reasonable limit demonstrably justified in a free and democratic society. He reviewed the history of Workers' Compensation and acknowledged that its purpose is to eliminate fault and to provide speedy determination of entitlement to compensation. This he found to be "a reasonably satisfactory response to the perceived needs of society."[33] In other words, he apparently found the purpose of the limit to be demonstrably justified.

However, the means which the limit entails were found to be unreasonable. The purpose could be achieved by means less destructive of Charter rights, according to the court. The British system of workers' compensation provides a minimum level of no-fault benefits to workers yet the right to sue the employer at common law is retained. Chief Justice Hickman states that this system is to be preferred and represents a viable alternative to the means currently used:

> The [Newfoundland Workers' Compensation] legislation could have provided a worker and his dependents with the right of speedy recovery of compensation benefits to be fixed by a board regardless of fault at the same level now provided in the Act without eliminating the right to pursue an action in the Courts against a tort feasor.

At first glance, the court's analysis seems very solid on this point. Income can be replaced on a no-fault basis and damages for pain and suffering etc. (general non-pecuniary damages) can be awarded by the court only if the employer's negligence is proved. But this raises, in reality, two further problems:

> **1)** negligent workers under the Act would be better off than negligent workers not under the Act, who could then complain in turn that they are thereby denied equal protection and benefit under the law. It is submitted that a fault system and no-fault system cannot be blended into one indivisible system either in principle or in practice without some group of potential claimants having their rights violated;
>
> **2)** employers would have to pay (presumably) the same assessments in order to maintain the no-fault benefits, plus they would be open to further pecuniary liability on a fault basis. Employers under the Act would then be liable not only for negligence but even when not negligent, as compared to any other defendant in the court system who is liable only for negligence. As between these two groups, employers under the Act would arguably not be receiving equal protection and benefit of the law and could seek to strike down the new Workers' Compensation legislation in turn.

The British system may be all very well, but Britain has no entrenched Charter, as we do, to limit the supremacy of Parliament. A system acceptable in Britain could be unconstitutional here.

Surely it cannot be argued that current means are unreasonable because potentially unconstitutional alternative means exist?

It is my own opinion that there are only three ways to combine a fault and no-fault system that could avoid the more obvious constitutional problems. But each would involve a significant detriment to the social value of the current workers' compensation system:

1) a system which maintains no-fault, income replacement benefits for all, plus preserving the right to sue at common law for damages, **BUT** the worker must elect between one remedy or the other. If no-fault is chosen, s/he cannot sue. If fault is chosen, s/he can sue but cannot receive no-fault benefits in the meantime. This system would continue to be funded solely by employers. Obviously, the old evils would re-arise of workers pressed for means of support foregoing their right to sue even if they have a case, and lawyers skimming off fees.

2) a system on the Manitoba Public Insurance Corporation mandatory insurance model. The Workers Compensation Board would be a government insurance company indemnifying both employers (who would pay premiums for third party liability) and workers (who would pay premiums for no-fault benefits and third party liability insurance since they'd be open to suit from co-workers). Thus workers could receive no-fault insurance benefits to replace income temporarily and to compensate for meat-chart dismemberments, while still being able to sue for more (assuming they have a case). The obvious drawback is the mandatory financial burden of premiums on workers.

3) a system which maintains no-fault, income replacement benefits for all, plus preserving the right to sue at common law for damages, and where the worker can have the benefit of both at once. But here the funding for the no-fault benefits would have to come from the public purse, the objections to which are obvious.

Referring back to the "proportionality test," it is submitted that the most major consideration in applying s. 1 might be stated as follows. Is the social objective of workers' compensation as it currently exists (to provide income replacement for industrial injuries speedily and on a no-fault basis) important enough to offset the limitation of s. 15 entailed by denying court access to workers when the deleterious effects of such a limitation mean, in practical terms, that innocent workers are under-compensated by common law standards so that negligent workers may be over-compensated by common law standards? The answer to this, it is further submitted, will be ideological, rather than "purely" legalistic, in nature.

D. EXCLUSION OF COVERAGE

The various exclusions of certain classes of workers from Workers' Compensation coverage (for example—outworkers, farm labourers, babysitters, companions to the elderly, certain domestics, etc.) would seem to be a clear violation of s. 15 of the Charter. Certainly the protection of and benefit of Workers' Compensation law is being denied to certain employees solely on the basis of their employment function. Nor would s. 1 be of much avail, one suspects, since the purpose of such exclusions concern reasons of administrative expediency and, it would appear, enshrine negative social perceptions concerning the relative lack of worth of those performing the lowest paying, most manual areas of labour.

E. DIVERSION AND SUSPENSION OF BENEFITS

There are several sections in our *Workers Compensation Act* which empower the Board, in certain circumstances, to suspend, withhold, or divert the payment of benefits. In light of s. 15 of the Charter, some or all of these may be challengeable.

> Sections 21(2) and (3) provide that:
>
> **21(2)** Where a claimant is confined to a gaol or a hospital as defined in The Mental Health Act, the board may after due investigation, withhold or suspend the payment of compensation to the workman or such other person receiving compensation for such period as the board deems proper.
>
> **21 (3)** Where compensation is so withheld it may be paid to dependants of the claimant or to such other persons as the board deems advisable.

It is submitted that insofar as mental hospital patients are concerned, this clearly violates s. 15 (1) of the Charter, which expressly forbids discrimination on the basis of mental disability. Note that this section not only authorizes the suspension of the payment of compensation to the worker but also to "such other person" who presumably would either be a spouse, dependent or survivor. Moreover, since the period of suspension is at the sole discretion of the Board, presumably it may continue even after the recipient's release!

As for those recipients of workers' compensation who are subsequently incarcerated in jail, this discretionary power to withhold or divert payments also seems to be a clear breach of s. 15, especially given the recent success of using s. 15 to restore prisoners' rights to vote. The paternalistic Victorian moralism of provisions such as these is staggering, especially when it is considered that these benefits are compensatory in nature, based on the **right** to be so compensated, and not some kind of goodwill, charity handout given upon the whim of the more fortunate.

Another major diversion power is contained in s. 21(5):

> **21(5)** Where a workman is entitled to compensation and it is made to appear to the board
>
> (a) that the workman is no longer residing in Manitoba, but that the workman's spouse or child or children under sixteen years of age are still residing therein without adequate means of support and are, or are apt to become, a charge upon the municipality where they reside or upon private charity; or
>
> (b) that the workman, although still residing in Manitoba, is not supporting his spouse and children as aforesaid and an order has been made against the workman by a court of competent jurisdiction for the support or maintenance of his spouse or family, or for alimony;
>
> the board may
>
> (c) divert the compensation in whole or in part from the workman for the benefit of the spouse or children of the workman; or

> (d) where a municipality is actually partially or wholly supporting the spouse or family of the workman, divert the compensation in whole or in part from the workman to the municipality.

Note that in s. 21(5)(b), the Board's power to divert has a precondition that a court order for support is in existence, but in s. 21(5)(a) no such precondition is required. The only factual difference is the residence of the worker. A deserted family can easily obtain a court order for support from a spouse residing in another jurisdiction. There is no good reason why a court order should not be a precondition in both situations.

Moreover, there is no reason why the Board should even have diversion power in this situation. Where there is a court order for support, the *Garnishment Act* provides that workers' compensation benefits may be attached or garnished, overriding the prohibition against such attachment in s. 20 of *The Workers Compensation Act*. There is no need to extend paternalistic supervisory power to the Board in this day and age of widespread availability and enforcement of court orders for support. As for diverting compensation benefits to a municipality which is supporting a family on welfare, municipalities can look after themselves by getting an assignment of support paid under a court order; it should not be up to the Board to play Robin Hood to the municipalities.

Specifically in re the Charter, even if s. 21(5) does violate s. 15, the social importance which courts now give to enforcing support of families could probably save it under s. 1. But this challenge need not ever arise, by the simple expedient of taking such matters out of the Board's hands in any event since social and legal mechanisms now exist that can do the job better.

Yet another diversion power is contained in s. 21(4):

> **21(4)** Where the surviving spouse of a deceased worker is receiving compensation, and the board determines that the surviving spouse is cohabiting with a person of the opposite sex in a relationship in which the surviving spouse is dependent upon the other person for support, the board may discontinue or suspend the payment of compensation to the spouse and may divert the compensation in whole or in part to, or for the benefit of, any other dependent of the deceased worker.

The initial reaction to this section may be to exclaim over the apparent mandate of the Board to enforce morality. However, the focal point of the section is dependency. Survivor benefits are paid to the worker's dependents, which has a specific definition in s. 2 (1)(g) of the *Act*:

> "dependents" means those members of the family of a workman who were wholly or partly dependent upon his earnings at the time of his death or who, but for the incapacity due to the accident of the workman would have been dependent, but a person shall be deemed not to be partially dependent upon the earnings of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life.

A spouse is not entitled to survivor benefits merely by virtue of his/her status as "spouse." If dependency is the basis for entitlement, therefore, it follows that when dependency ceases, so does entitlement. There is a difference in the *Act*, however, between a surviving spouse who remarries and one who merely lives common law. S. 27(1) provides that:

> **27(1)** Where the surviving spouse of a worker is receiving compensation and he or she remarries, and the board determines that the surviving spouse is dependent upon his or her new spouse for support, the board may terminate monthly payments to the surviving spouse, but upon so doing shall pay the surviving spouse a lump sum of $3,600.00.

The obvious assumption is that remarriage, being permanent, ends the former dependency forever, while living common law is not permanent, so that the former dependency may revive upon the split up of the couple. It is this difference in treatment which may be attackable under s. 15—equality of benefit or protection of the law would seem to require that the $3600 lump sum become payable when dependency ceases (whether by remarriage or common law relationship).

The Charter of Rights Coalition (Manitoba) brief[34] presented to this Committee recommends that surviving spouse benefits be continued for the life of the spouse, regardless of lack of dependency. Such a right, while not necessarily in violation of the Charter, would be nevertheless inconsistent with the legal principles of compensation and general damages law. Compensation is awarded to the **victim** of accident. It is designed to put the victim back in his/her original position prior to the accident. This principle is limited in workers' compensation to income replacement. Compensation or damages never accrue to the spouse of a victim in his/her own right or by virtue of the marital status. Where death occurs as a result of industrial accident, it is fair and logical for the dependents (and the dependents alone) on the lost income to receive benefits. When dependency ends, so should this right.

The sections which [personally I find] are truly objectionable are ss 25.3, 27(4) and 27(5):

> **25.3** Where a workman dies as the result of an accident and leaves no surviving spouse, or the surviving spouse subsequently dies, and it seems desirable to the board to continue the existing household, and a relative or other suitable person acts as foster parent in keeping up the household and maintaining and taking care of the dependent children entitled to compensation in a manner which the board finds satisfactory, the foster parent shall be deemed to be the surviving spouse of the workman and the board shall pay to the foster parent so acting the same monthly payments of compensation for the foster parent and the dependents as if the foster parent were the surviving spouse of the workman; and in that case any compensation paid to the foster parent in respect of the dependents shall be in lieu of the monthly payments which the dependents would otherwise have been entitled to receive.
>
> **27(4)** Where a surviving spouse of a workman, to whom compensation is being paid under section 25 or 25.1, does not maintain a dependant of the workman in respect of whom compensation might be paid under section 25 in a manner satisfactory to the board having regard to the welfare of the dependant, compensation in respect of the dependant, calculated as provided under section 25, shall be paid in such manner and to such person, or either as the board considers advisable for the advantage of the dependant and the compensation payable to the surviving spouse shall be reduced by that amount.
>
> **27(5)** Where the board is of the opinion that for any reason it is necessary or desirable that a payment under section 25 in respect of a dependent child should not be made directly to his parent, the board may make the payment to such person, or direct that it be applied in such manner, or both, as the board considers advisable for the advantage of the child.

It is submitted that these sections violate s. 15 for the following reason. A parent having legal custody of a child is entitled to bear responsibility for that child, including manner of child rearing and disposition of income on behalf of that minor child, until such time as a court of competent jurisdiction relieves the parent of custody in accordance with the best interests of the child. Short of the child being apprehended by a child protection agency or a superior court giving guardianship of the child to another, it is submitted that paternalistic power such as this vested in the Workers Compensation Board denies surviving spouses equality before and under the law with other parents.

If the Board has reason to believe that the maintenance of a dependent child is unsatisfactory having regard to his/her welfare, it can contact a child protection agency to investigate. If custody is removed by court order from a parent, then certainly the children's compensation should be diverted for their benefit to the new child caring person or agency.

One other circumstance may justify diverting children's benefits: where the surviving spouse does not have physical custody of the children, although legal custody is maintained. This would cover situations where children are left with friends or relatives in non-abandonment situations.

F. REHABILITATION ISSUES

A Charter argument was advanced in regard to rehabilitation in the case of *Hamilton* v. *Workers' Compensation Commission of Newfoundland and Labrador*.[35] The Newfoundland *Act* provides that the Commission "may take such measures and make such expenditures as it may in its discretion deem necessary or expedient to provide that worker with... academic or vocational training."[36] (Although our Manitoba sections 24(16) and 24(21) are worded differently, the breadth of discretion is substantively similar). The Commission retroactively terminated Hamilton's rehabilitation allowance for a 3-month period while he was awaiting entry into a course and said the benefits he'd received over that 3-month period had to be repaid as an overpayment.

One argument advanced was that the section containing the broadly discretionary rehabilitation provisions violated section 7 of the Charter ("life, liberty and security of the person" etc.). The rather bizarre argument went along the following lines: section 1 of the Charter says that rights are guaranteed subject only to "such reasonable limits" prescribed by law as can be demonstrably justified etc. Once accepted into the Rehab program, "security of the person" is guaranteed to that individual. Therefore, any "reasonable limits" on that right must be expressly contained in the rehabilitation provisions because of s. 1 of the Charter and it is unconstitutional for the Commission to be given discretion in this area.

Needless to say, this argument received the short shrift it deserved from the court.

A more fruitful area of Charter challenge may be the issue of "forced rehabilitation." The issue does not arise where a pension has been assessed by the physical impairment method or by the projected loss of earnings method, but rather, where the actual loss of earnings method is used or where wage loss supplements are payable. In the latter two areas, failure of a worker to submit to rehabilitation measures will cause the loss of compensation benefits.

Terry Ison, whose argument this is, states that compulsory submission to rehabilitation

> is...open to a range of objections related to directed labour, the impairment of mobility rights, ongoing surveillance, ongoing submission to medical examination and psychological testing, continuing loss of confidentiality of medical information, and other incursions on civil liberties.[37]

He suggests that compulsory submission arguably violates s. 2 (d) of the Charter ("freedom of association"), s. 6 (1) and (2) (the right to move from Canada or from the province to reside elsewhere), s. 7 (right to "liberty"), and s. 15(1).

Both s. 6 and s. 15 have exceptions to permit affirmative action programs, termed "any law, program or activity that has as its object the amelioration" of the conditions of, among other things, economically disadvantaged or physically disabled individuals. The exception is designed to prevent Charter challenges from people who do not benefit from affirmative action programs. But in the forced rehab situation it is of course the recipient of the program who would want to bring a Charter challenge. It is at least arguable, however, because of the broad wording of these sections that the complaints even of recipients may be foreclosed by the exception.

Ison does not consider the effect of s. 1 of the Charter (understandably enough, since the purpose of his book was not in-depth Charter speculation). When seeking common law damages, there is a positive duty placed on the victim/plaintiff to mitigate his/her losses. So, for example, if certain treatment is available to correct an injury and the victim fails to undergo it, the damage award will be correspondingly reduced by the amount of mitigation that might have otherwise accrued. It could very well be that a court would "translate" this common law concept into a finding that the limitations on a person's rights by forced rehabilitation constitute reasonable limits demonstrably justified in a free and democratic society.

G. MISCELLANEOUS CHARTER ARGUMENTS

One other case has considered the Charter in a workers' compensation context. Hardly an earth-shattering case, it is mentioned for the sake of completeness.

In *Re Workers' Compensation Board of Nova Scotia and Coastal Rentals, Sales & Service Ltd.*,[38] the Nova Scotia *Act* provides that unpaid assessments constitute a first lien on all property of the employer. (Our *Act* has no similar provision). When the Sheriff seized a backhoe, the employer argued that the statutory workers' compensation lien breached s. 7 ("security of the person") and s. 8 (security "against unreasonable search or seizure") of the Charter because these sections entrench property rights. The argument failed, and the court held yet again that the Charter does not protect property rights.

IV. CONCLUSION

Section 15 of the Charter is the greatest single threat to Workers' Compensation, both in having the potential to bring the entire system down if the removal of the right to sue is ultimately held unconstitutional, and in terms of the constitutionality of various severable sections of the *Act*. Section 6 mobility rights will be the other major source of constitutional challenges.

FOOTNOTES

1. *Canada Act*, U. K. Statutes, 1982, c. 11, Schedule B, Constitution Act, 1982, Part I, Canadian Charter of Rights and Freedoms.

   (Hereinafter referred to simply as "The Charter")

2. *Re Skapinker and Law Society of Upper Canada* (1984), 9 D.L.R. (4th) 161 at 181 (S.C.C.).

3. R.S.M. 1970, c. W200, as am.

4. *Workmen's Compensation Board* v. *Canadian Pacific Railway*, [1920] A.C. 184 at 191 (J.C.P.C.).

5. Terence G. Ison, *Workers' Compensation in Canada* (Toronto: Butterworth's, 1983), p. 152.

6. *Kruger* v. *The Queen*, [1978] 1 S.C.R. 104 at 110 (*per* Dickson, J., as he then was).

7. *Re Municipal Act, Re Ukrainian Greek Catholic Parish of St. Michael's* (1957), 65 Man. R. 215. Because a priest's living quarters were in the Church building, and because the Church Hall was rented out for bingo, the court held that the church building could not be considered as being used "primarily by a religious denomination for the purpose of public worship" as required by statute for tax exemption status.

8. *Re Fleisher* (1981), 9 M.V.R. 287 (Man. C.A.). The court was interpreting the word "primarily" used in a section of the *Manitoba Public Insurance Act*

9. *Elder's Beverages (1975) Ltd.* v. *Registrar of Trade Marks*, [1979] 2 F.C. 735 (F.C.T.D.). Here the court was interpreting the word "primarily" in the context of trade mark law.

10. (1984), 11 D.L.R. (4th) 219 (N.S.C.A.).

11. This case is on appeal to the S.C.C., but no decision has yet been released.

12. (1984), 14 C.C.C. (3d) 97 (S.C.C.).

13. *Ibid.*

14. (1985), 51 O.R. (2d) 509 (Ont. C.A.).

15. (1985), 22 D.L.R. (4th) 609 (Sask. Q.B.).

16. *Gershman Produce Co. Ltd.* v. *Motor Transport Board* (1985), 22 D.L.R. (4th) 520 (Man. C.A.).

17. (1983), 148 D.L.R. (3d) 380 (Ont. H.C.J.).

18. (1984), 6 O.A.C. 33 (Ont. H.C.J.).

19. [1985] 1 W.W.R. 437 (Alta. Q.B.).

20. *Id.*, at 449-50.

21. unreported, Sept. 30, 1986 (Nfld. S.C.).

22. Cristin Schmitz, "Workers have Charter right to sue employers," *The Lawyers Weekly* (Vol. 6, No. 27), Friday, November 14, 1986, p. 12, c.1.

23. *Supra*, n. 21, at 17.

24. *Id.*, p. 6.

25. *Streng* v. *Winchester* (1986), 39 A.C.W.S. (2d) 416 (Ont. H.C.J.).

26. *Meldrum* v. *Saskatoon* (1986), 35 A.C.W.S. (2d) 168 (Sask. Q.B.).

27. (1986), 44 Alta. L.R. (2d) 293.

28. *Id.*, at 299. [emphasis in original].

29. *R.* v. *Oakes* (1986), 24 C.C.C. (3d) 321 at 348 (S.C.C. per Dickson, C.J.C.)

30. *Singh* v. *Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 (S.C.C.). NB: *obiter.*

31. Gibson, Dale. *The Law of the Charter: General Principles* (Toronto: The Carswell Company Limited, 1986), p. 147.

32. *Supra*, n. 29, at 348-49.

33. *Supra*, n. 21 at 20.

34. Written Brief #14 (Other).

35. (1985), 55 Nfld. & P.E.I.R. 326 (Nfld. S.C.).

36. *Id.*, at 327.

37. *Supra*, n. 5, at 99-100.

38. (1983), 12 D.L.R. (4th) 564 (N.S.S.C.).

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Prepared by: Debra Hathaway

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Extra provincial employment.

4 (7) Subject to any agreement made under subsection (8), and to section 4.1, no compensation is payable under this Part where the accident to the workman happens elsewhere than within the province.
En. S.M. 1972, c. 46, s. 5.

Inter-provincial agreements.

4 (8) To avoid duplication of assessment to which an employer may be liable on the earnings of workmen who are employed partly within Manitoba and partly within another province or territory of Canada, the board may enter into agreements with The Workmen's Compensation authority or Workers Compensation authority of that other province or territory respecting equitable adjustments of assessments and may reimburse that authority for any payment of compensation, rehabilitation or medical aid made by it under the agreement, and may, in order to give effect to the agreement, relieve the employer from assessment or reduce the amount thereof; and any agreement made under this subsection supersedes the provisions of this Act to the extent necessary to give full effect to the agreement.
En. S.M., 1969, (2nd Sess.), c. 41, s. 6: Am. S.M. 1974, c. 49, s. 11

Accidents outside province.

4.1 (1) Where

(a) the place of business or chief place of business of the employer is situated within the province;

(b) both the residence of the workman and the place where the workman usually works for the employer are within the province;

(c) an accident happens while the workman is employed outside the province; and

(d) his employment outside the province has lasted less than six months;

the workman is or his dependants are entitled to compensation under this Part in the same manner and to the same extent as if the accident had happened within the province.
En. S.M. 1972, c. 46, s. 8.

Where workman employed more than six months outside province.

4.1 (2) Where

(a) the place of business or chief place of business of the employer is situated within the province;

(b) both the residence and the place where the workman usually works for the employer are within the province; and

(c) the employment of the workman outside the province lasts or is likely to last for six or more months;

the employer may apply to the board to be assessed on the earnings of the workman and, if the application is approved by the board and if the workman is injured by accident happening outside the province, the workman is or his dependants are entitled to compensation under this Part in the same manner and to the same extent as if the accident had happened within the province.
En. S.M. 1972, c. 46, s.8.

Accidents while outside province temporarily.

4.1 (3) Where the place of business or the chief place of business of the employer is situated within the province and the residence of the workman is outside the province but the place where the workman usually works for the employer is within the province, and an accident happens while the workman is outside the province merely for some temporary purpose connected with his employment, the workman is or his dependants are entitled to compensation under this Part in the same manner and to the same extent as if the accident had happened within the province.

Where employer's place of business outside province.

4.1 (4) Where

(a) —an accident happens outside the province;

(b) the employer's place of business or chief place of business is situated outside the province; and

(c) the workman is entitled to compensation under the law of the place where the accident happened;

compensation is not payable to the workman or his dependants whether his residence is in or outside the province unless his usual place of employment is within the province and he is at the time of the accident outside the province merely for some casual or incidental purpose connected with his employment.
En. S.M. 1972, c. 46, s. 8.

Accidents on ships, etc.

4.1 (5) Where

(a) an accident happens outside the province in connection with the operation of a steamboat, ship or vessel, or of a railway, or of an aircraft, or of a truck, bus or other vehicle used in the transportation of passengers or of any goods or substance;

(b) the residence of the workman is within the province; and

(c) the work or service performed by him is required to be performed both within and outside the province;

the workman is or his dependants are entitled to compensation under this Part as if the accident had happened within the province.

En. S.M. 1972, c. 46, s. 8.

Assessment of employer of workman outside province.

4.1 (6) Where a workman is employed outside the province and the circumstances of

(a) the place of business or chief place of business of the employer of the workman;

(b) the residence of the workman; and

(c) the usual place of work of the workman;

are such that if an accident happened while the workman was employed outside the province, he or his dependants are entitled to compensation as if the accident had happened within the province, the employer shall, unless he is relieved from assessment under an agreement made under subsection (8) of section 4, declare and be assessed on the earnings of the workman in the same way and in the same amounts as though the workman was employed within the province.

En. S.M. 1972, c. 46, s. 8.